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DOCUMENTS
OF THE
SENATE
OF THE
STATE OF NEW YORK
ONE HUNDRED AND THIRTY-SIXTH SESSION
1913

VOL. XXVI.—No. 50.—PART 4



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ALBANY
J. B. LYON COMPANY, PRINTERS
1913

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REPORTS OF DECISIONS
OF THE
PUBLIC SERVICE COMMISSION
SECOND DISTRICT
OF THE STATE OF NEW YORK

FROM JULY 1, 1911, TO MAY 7, 1913

Volume III

ALBANY
1913

ALBANY
J. B. LYON COMPANY, PRINTERS
1913

By Transfer
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COMMISSIONERS

FRANK W. STEVENS, *Chairman*¹

MARTIN S. DECKER

JAMES E. SAGUE

JOHN B. OLMSTED

WINFIELD A. HUPPUGH²

CURTIS N. DOUGLAS³

DEVOR P. HODSON⁴

¹ Resigned May 2, 1913.

² Resigned November 15, 1912.

³ Appointed November 15, 1912, vice Huppugh, resigned.

⁴ Appointed February 7, 1913, vice Olmsted, term expired.

The Public Service Commission, Second District of the State of New York, was appointed pursuant to the provisions of chapter 429 of the laws of that State for the year 1907, and took office July 1, 1907. It is the practice of the Commission to file written opinions in such contested matters coming before it as seem to demand careful statement of the grounds for the decision. It is also the practice in *ex parte* applications to file written opinions, where the facts are complicated or an interpretation of the laws conferring jurisdiction upon the Commission is required. These opinions are first printed in pamphlet form, and will be published in bound volumes from time to time.

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In the Matter of the Application of EMPIRE GAS AND ELECTRIC COMPANY for authority to issue \$900,000 in amount of common capital stock.

In the Matter of the Application of EMPIRE GAS AND ELECTRIC COMPANY for authority to issue \$2,400,000 in amount of 5 per cent joint first and refunding thirty-year gold bonds to be secured by a joint first and refunding mortgage for \$5,000,000 executed by said Company and Empire Coke Company.

In the Matter of the Application of EMPIRE GAS AND ELECTRIC COMPANY for permission and approval to acquire the entire capital stock of Inter-Urban Gas Company, The Auburn Light, Heat and Power Company, Auburn Gas Company, Citizens Light and Power Company, and Auburn Subway and Electric Company.

In the Matter of the Application of EMPIRE GAS AND ELECTRIC COMPANY for permission and authority to merge into itself Inter-Urban Gas Company, The Auburn Light, Heat and Power Company, Auburn Gas Company, Citizens Light and Power Company, and Auburn Subway and Electric Company.

In the Matter of the Application of INTER-URBAN GAS COMPANY to merge into itself Seneca Falls and Waterloo Gas Light Company, and for approval of merger into itself of Geneva Gas Company.

1. The work of the Commission under sections of the law relating to capitalization and mergers or consolidations is constructive as well as restrictive, and its powers of revision or restriction with those relating to approval or disapproval enable it in many cases, by advice as well as ruling, to bring about effective reorganizations upon bases fair alike to the public, corporations affected, and holders of securities involved;

and this valuable function of government should be exercised when and to the extent practicable.

2. Merger of Seneca Falls and Waterloo Gas Light Company and Geneva Gas Company with Inter-Urban Gas Company, and merger of Inter-Urban Gas Company and Auburn Gas Company with Empire Gas and Electric Company, approved.

3. Transfer by deed of properties of The Auburn Light, Heat and Power Company, Auburn Subway and Electric Company, and Citizens Light and Power Company of Auburn to Empire Gas and Electric Company, approved.

4. Purchase of stock of Inter-Urban Gas Company, Auburn Gas Company and stock of The Auburn Light, Heat and Power Company, Auburn Subway and Electric Company, and Citizens Light and Power Company by Empire Gas and Electric Company prior to said mergers, approved, the contract to purchase the stock of the three companies last named providing for their being practically freed by this scheme from existing debts.

5. Empire Gas and Electric Company authorized to issue common capital stock of \$600,000, to execute a mortgage in conjunction with Empire Coke Company, and to issue under said mortgage \$2,233,000 bonds, to refund outstanding bonds of merged companies, and for other described purposes, but *held* that order authorizing such bond issue shall provide that bonds issued under such joint mortgage shall be solely for and on account of lawful purposes of Empire Gas and Electric Company.

6. Empire Gas and Electric Company required to have made by an approved competent engineer an inventory and appraisal of each of the properties taken over by that company, the same to be made under direction of the Commission and submitted to it for approval or correction, and said Empire Gas and Electric Company required to correct its fixed capital and other accounts in accordance with such inventory and appraisal.

7. Reorganization thus effected reduces in amount outstanding stocks by \$715,000, and bonds by \$154,658.81, a total of \$869,658.81. Amount of stock and bonds sought to be issued reduced by \$467,000, and amount of stock and bonds allowed covers improvements of property to amount of \$173,726.30.

Submitted May 11, 1911. Decided July 12, 1911.

Lansing G. Hoskins for the applicants.

C. T. Whelan, city attorney, for the City of Auburn.

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DECKER, Commissioner:

These cases are treated as one. The proceeding presents for consideration the proposed merger of various gas and electric properties and a general financial reorganization.

The Empire Gas and Electric Company was incorporated April 11, 1911, with a stated capital stock for corporate purposes of \$900,000. It is a gas and electrical corporation organized under the Transportation Corporations Law. The main purpose of incorporation is the taking over of the stock of and merging into itself the Inter-Urban Gas Company, Auburn Gas Company, Auburn Light, Heat and Power Company, Citizens Light and Power Company, Auburn Subway and Electric Company, and Seneca Falls and Waterloo Gas Light Company. The companies named all operate in Auburn, except the Inter-Urban Gas Company which operates in Geneva as successor of the Geneva Gas Company, and except the Seneca Falls and Waterloo Gas Light Company which operates in Seneca Falls and Waterloo, all of the capital stock of which company is owned by the Inter-Urban Gas Company.

The Empire Coke Company, located in Waterloo, owns all of the stock of the Auburn Gas Company and the Inter-Urban Gas Company. This company manufactures coke, and in such manufacture produces gas as a byproduct in large volume which it sells to lighting companies. It desires to extend in various ways the sale of that byproduct much of which at the present time has no market.

The American Gas and Electric Company owns all of the stock of the three electrical companies in Auburn: namely, Auburn Light, Heat and Power Company, Auburn Subway and Electric Company, and Citizens Light and Power Company.

The American Gas and Electric Company has entered into a contract with the Empire Coke Company for the sale of the stock of the Auburn Light, Heat and Power Company,

Auburn Subway and Electric Company, and Citizens Light and Power Company.

The important features of this contract are: The stock of the three Auburn electrical companies is to be turned over to a corporation formed by the Empire Coke Company. That new corporation is this new company, the Empire Gas and Electric Company. For this stock and other considerations below stated it is proposed to pay \$605,000 cash and \$300,000 of the first preferred stock or 6 per cent cumulative income bonds of the Empire Coke Company, that company having the option to pay either such preferred stock or income bonds for that purpose. Such issue of preferred stock or income bonds of the Coke company is to be acquired by the Empire Gas and Electric Company through issuance of bonds under the mortgage herein proposed, and which will be later discussed. The stock of the three companies to be so purchased represents in par value \$625,000. In addition to the stock the three electrical companies are to be freed entirely from their existing debts which amount to a large sum, something more than \$834,000. The total face value consideration therefore is, in round figures, \$1,459,000 for \$905,000, of which \$605,000 is cash and \$300,000 is stock or income bonds of the Coke company. In addition to such consideration the American company agrees to turn over the control of the Auburn Light, Heat and Power Company and Auburn Subway and Electric Company, with cash, bills and accounts receivable, material and supplies and prepaid insurance equal to \$30,000 in value over and above any current liabilities. This does not include any liabilities of the three companies which have been contracted for improvements and betterments since October 1, 1910. The Citizens Light and Power Company is a non-operating company, but it also is to be turned over free of all liens and incumbrances and all liabilities except the amount due from that company to the Auburn Light, Heat and Power Company as of October 31, 1910. The accounts payable of the Citizens company amount to \$9327.69. The amount due the Auburn Light,

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Heat and Power Company is not stated. The following tabular statement shows concisely the proposed transaction:

Auburn Light, Heat and Power Co. stock...	\$300,000.00	
Citizens Light and Power Co. stock.....	250,000.00	
Auburn Subway and Electric Co. stock.....	75,000.00	
		<hr/> \$625,000.00
Auburn Light, Heat and Power Co. bonds...	\$308,000.00	
Auburn Light, Heat and Power Co. notes...	440,955.52	
Auburn Light, Heat and Power Co. accounts payable	21,313.31	
Auburn Subway and Electric Co. notes.....	64,109.69	
		<hr/> 834,378.52
Total	\$1,459,378.52	
Purchase price:		
Cash, \$605,000; bonds of Empire Gas and Electric Co. at 85.....	\$711,764.70	
Empire Coke Co. first preferred stock or income bonds	300,000.00	
		<hr/> 1,011,764.70
Reduction of liability resulting.....	\$447,613.82	

The net result of this proposed taking over of the Auburn Light, Heat and Power Company, Auburn Subway and Electric Company, and Citizens Light and Power Company is that for an expenditure by the Empire Gas and Electric Company of \$1,011,764.70 in a bond issue, it secures the three Auburn electric properties free practically from all debt. This is, therefore, to all intents and purposes, a sale, free from debts, of the three electric properties to the Empire Gas and Electric Company.

The Citizens Light and Power Company is not an operating company, but it has its franchise in Auburn and is a potential competitor. It has some little property but the amount in value has not been stated or ascertained. Its capitalization is \$250,000 stock and \$250,000 bonds, and it is probably one of those companies which in the past were formed more for purposes of capitalization than for actual operation.

By this agreement the Citizens Light and Power Company is done away with and its extravagant capitalization is extinguished. Its bond liability of \$250,000 is not set out in the foregoing table, since these bonds are owned by the Auburn Gas Company. They have no real value, and under the proposed plan the Auburn Gas Company will be taken over also by the Empire Gas and Electric Company. These bonds of the Citizens company are deposited as collateral to secure mortgage bonds of the Auburn Gas Company, and the mortgage bonds of that company are also included in the funding scheme here presented.

Another principal feature of this plan of reorganization is the taking over by the Empire Gas and Electric Company of the stock of the Auburn Gas Company and the stock of the Inter-Urban Gas Company, both of which are held by the Empire Coke Company. For that purpose the Empire Gas and Electric Company has stated its desire to issue \$900,000 common stock and to pay that stock over to the Empire Coke Company for \$600,000 stock outstanding of the Auburn Gas Company and \$10,000 stock outstanding of the Inter-Urban Gas Company. This latter company owns all of the stock of the Seneca Falls and Waterloo Gas Light Company, and some years ago it merged with itself the Geneva Gas Company, but through error this was done without the approval of the Commission of Gas and Electricity, and a part of the present plan is to secure approval by the Commission of this merger already effected. While the capital stock of the Inter-Urban Gas Company is nominal (\$10,000), its bonded debt is large — \$438,000. Such bonded debt is a joint liability of the Inter-Urban Gas Company and the Empire Coke Company. In addition to this, the Inter-Urban Gas Company is burdened with \$10,000 bonds of its merged corporation, the Geneva Gas Company. Besides the stock of the Seneca Falls and Waterloo company, \$80,000, the Inter-Urban company also owns \$23,000 bonds of the Seneca Falls and Waterloo company. Neither the

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Auburn Gas Company nor the Inter-Urban Gas Company pays a dividend. The subsidiary company of the latter company, the Seneca Falls and Waterloo company, does not pay a dividend. The stated surplus, after paying all charges, for the year ended December 31, 1910, was for the Auburn Gas Company \$9041.46, for the Inter-Urban Gas Company \$1805.66, without deducting any depreciation account; with such deduction there is a stated deficit of \$1194.34. The stated surplus of the Seneca Falls company for that year is \$3648.87.

This Commission can find no ground for approval of an issue of stock by this new company, the Empire Gas and Electric Company, in the amount of \$900,000 with which to purchase from the Empire Coke Company the stock of the Auburn Gas Company and the Inter-Urban Gas Company, amounting to a total of \$610,000. The various accounts of the Auburn and the Inter-Urban companies present no showing that would warrant the stocks of these companies to be regarded as worth one and one-half times their par value. This conclusion is inevitable. The Commission is informed by the president of the Empire Coke Company that it, as the moving agency in the proposed organization, consents to a reduction of the desired stock issue for the Empire Gas and Electric Company to \$600,000, which is less than the combined stocks of the Inter-Urban Gas Company and the Auburn Gas Company. We shall assume, in the further discussion of the case, that the Empire Coke Company will sell its stockholding interest in the Auburn Gas Company and Inter-Urban Gas Company for that amount of the stock of the Empire Gas and Electric Company.

The Empire Gas and Electric Company asks also for our approval of a joint first and refunding mortgage to be executed jointly by the Empire Gas and Electric Company and the Empire Coke Company to secure bonds amounting in the aggregate to \$5,000,000 which shall bear 5 per cent interest per annum, payable semiannually, and mature in

thirty years. The present mortgage of the Inter-Urban Gas Company is a joint mortgage executed by it and the Empire Coke Company, and the amount secured by such present mortgage is \$500,000, but only \$438,000 bonds under that mortgage have been issued. All of such bonds have been issued for account of the Inter-Urban Gas Company. Since the present mortgage is joint, and the Empire Coke Company will own all of the stock of the Empire Gas and Electric Company, it seems desirable in order to secure exchange of bonds under the proposed mortgage for bonds outstanding under the present mortgage, that joint execution of the new mortgage should be approved. Such approval however must be subject to the condition, to be expressed in the mortgage itself, that bonds issued under the mortgage shall be solely for the benefit and extension or improvement of the property of the Empire Gas and Electric Company, or the lawful acquisition of property for that company, and that no bonds under said mortgage shall be issued for or on account of the Empire Coke Company. The Empire Gas and Electric Company will be directly engaged in the public service and as such should not, and can not lawfully, be permitted to pledge its property to secure the debts of another company. The Empire Coke Company is only technically a gas corporation, and is principally engaged as a business corporation in the manufacture and sale of coke. It is proposed now to issue under said new joint and refunding mortgage bonds aggregating in face value \$2,400,000, of which \$1,100,000 of bonds are to be certified and reserved to exchange for an equivalent principal amount covering the following underlying issues:

(a) Joint first mortgage 5 per cent bonds of Empire Coke Co. and Inter-Urban Gas Co.....	\$500,000
(b) First mortgage 5 per cent sinking fund bonds of Auburn Gas Co.	311,000
(c) First consolidated mortgage 5 per cent bonds of the Auburn Gas Co.	289,000
<hr/>	
A total of	\$1,100,000

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This should be reduced by \$62,000, the amount of bonds not issued under the mortgage stated above in subdivision (a). It should also be reduced by \$54,000, representing first mortgage sinking fund bonds of the Auburn Gas Company, subdivision (b). Of this \$54,000 in bonds, \$47,000 are in the sinking fund provided by the mortgage and \$7000 are in the treasury of the company.

It is also desired to issue under said proposed joint and refunding mortgage \$1,300,000, for the following purposes:

1. Purchase of stock of Auburn Light, Heat and Power Co., Citizens Light and Power Co., and Auburn Subway and Electric Co., as hereinabove described.... \$605,000.00
2. Purchase income bonds or first preferred stock of Empire Coke Co. to amount of \$300,000, the new bonds so exchanged therefor to be held by the Empire Coke Co. for its acquisition of bonds of Geneva Gas Improvement Co., aggregating \$300,000 in principal amount, to be pledged as collateral security under this mortgage 300,000.00
3. Pay off and cancel \$25,000 of debentures issued by Auburn Gas Co. under an authorized issue of \$100,000 approved by this Commission December 16, 1909 25,000.00
4. Open account of Auburn Gas Co. with Empire Coke Co., \$5905.63, and bills payable of Auburn Gas Co., \$23,000 28,905.63

Note: These bills and accounts are nominally for purchase of gas from Empire Coke Co., but from May 1, 1906, to May 1, 1911, Auburn Gas Co. expended for main extensions, line services, and meters, not including any replacements, \$34,446.53, the balance of which is not sought to be capitalized and will remain as income expenditure, thus constituting a substitution of the two accounts for the purposes of this case.

5. Open account of Seneca Falls and Waterloo Gas Light Co., due Empire Coke Co. nominally for gas, \$8101.78, and bills payable \$5000..... 13,101.78

Note: The Seneca Falls Co., from June 7, 1907, to May 1, 1911, paid out of income for extensions and improvements, not replacements, \$17,000. With the said accounts deducted, the balance of this sum is to remain uncapitalized.

6. Open account of Inter-Urban Gas Co. due Empire Coke Co. for gas \$19,218.89

Note: The Inter-Urban Gas Co., from January 1, 1906, to January 1, 1911, paid out of income for extensions and improvements, not replacements, \$23,760.34. With the said account deducted, the balance of this sum is to remain uncapitalized.

7. The mortgage recording tax, \$6500, and incorporation tax, \$450 6,950.00

Note: The schedule shows also an item for "Legal expenses and expenses of hearings, \$8050"; but this item is not supported by proof and can not be taken into account at this time.

These various amounts aggregate \$998,176.30, from which might be deducted the items numbered above 3, 4, 5, and 6, as representing indebtedness of companies independent in legal status of the Empire Gas and Electric Company, and which will remain so until after they shall be finally merged or consolidated with the Empire Gas and Electric Company. These items add up \$86,226.30. In case these properties shall be merged or consolidated with our approval granted in this proceeding, it seems unnecessary to complicate the situation by withholding approval until after the merger, merely as a matter of form, since the present order can provide that bonds to cover that amount shall not be issued until after the merger formalities shall have been completed. The taking up of the \$25,000 Auburn Gas Company debentures by bonds under the proposed merger should, however, be upon the basis of not less than par for par, since the new bonds are better security than the debentures.

The arrangement as above outlined leaves out of view the fact that under the order of the Commission upon the application of the Auburn Gas Company, which order was issued December 16, 1909, that company was authorized to issue on account of extensions and improvements its debentures to the amount of \$100,000. Of these debentures only \$25,000 have been sold. For the remaining \$75,000 of that issue, a like amount of these bonds should be substituted.

The contract with the American Gas and Electric Company, besides providing for the purchase of the stock of the three Auburn electrical companies, embraces an agreement for the purchase by the Empire Gas and Electric Company of two Curtis turbo generators of 500 kw. capacity each, with conductors, piping, accumulators, exciters, and other additions to render them complete and ready to set up. These generators are required by the Auburn Light, Heat and Power Company as additions to its plant. They are to be procured from the Rockford Electric Company, a corporation controlled by the American Gas and Electric Company. The purchase price of these generators and accessories is stated in the contract to be \$57,500. Such purchase is one of the considerations upon which the contract was entered into by the American Gas and Electric Company, and under the circumstances it should be approved.

Arranged in table form, the proposed bond issues which the Commission should permit under the new mortgage are as follows:

1. Reserve to fund bonds outstanding under present joint mortgage of Inter-Urban Gas Co. and Empire Coke Co.	\$438,000.00
2. Reserve to fund bonds outstanding of Auburn Gas Co.	546,000.00
3. To purchase stock of Auburn Light, Heat and Power Co., Auburn Subway and Electric Co., and Citizens Light and Power Co. (bond discount to be added)	605,000.00
4. To purchase income bonds or first preferred stock of Empire Coke Co. \$300,000, without discount, the new bonds so pledged to be used by Empire Coke Co. to acquire bonds of Geneva Gas Improvement Co.	300,000.00
5. Pay off and cancel \$25,000 of Auburn Gas Co.'s debentures issued under order of the Commission of December 16, 1909, without discount for new bonds	25,000.00
6. To cover accounts and bills payable (shown not to include replacements) of Auburn Gas Co., Seneca Falls and Waterloo Gas Light Co., and Inter-Urban Gas Co. (bond discount to be added).....	61,226.30

7. Tax for recording mortgage and for incorporation (bond discount to be added)	\$6,950.00
8. Remainder of amount of debentures authorized by Commission for Auburn Gas Co. account of extensions and improvements in order of Decem- ber 16, 1909, such authorization to be abrogated as to such remainder (bond discount to be added)	75,000.00
9. Purchase of two Curtis turbo generators and acces- sories as provided in contract between American Gas and Electric Co. and Empire Coke Co. (bond discount to be added)	37,500.00
10. Discount on bonds to be sold at not less than 85 per cent of par value as applied to items 3, 6, 7, 8, and 9 (total \$924,325)	138,648.70
Total new bond issue	<u>\$2,233,325.00</u>
Round figures	\$2,233,000.00
Less bonds reserved for refunding	<u>984,000.00</u>
Bonds sought for special uses	\$1,249,000.00
Amount of bonds to be sold at not less than 85 per cent of par value	924,000.00
Such total new bond issue would be less than the amount asked for (\$2,400,000) by	167,000.00
The amount of proposed capital stock for the new cor- poration, Empire Gas and Electric Co.	900,000.00
Is reduced by the Commission with the consent of appli- cant to	600,000.00
Net reduction of stock and bonds from amount asked for.	467,000.00
The total capitalization of the new company would be —	
Stock	\$600,000.00
Bonds	<u>2,233,000.00</u>
Total	<u>\$2,833,000.00</u>

The stocks canceled by the proposed plan are —

Auburn Gas Co., preferred	\$205,000.00
Auburn Gas Co., common	395,000.00
Auburn Light, Heat and Power Co.	300,000.00
Auburn Subway and Electric Co.	75,000.00

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Citizens Light and Power Co.....	\$250,000.00
Seneca Falls and Waterloo Gas Light Co.....	80,000.00
Inter-Urban Gas Co.	10,000.00

Total canceled	\$1,315,000.00
Stock of new company.....	600,000.00

Reduction effected	\$715,000.00
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The bonds and other indebtedness canceled by the proposed plan are —

Auburn Light, Heat and Power Co., bonds.....	\$308,000.00
Auburn Light, Heat and Power Co., notes.....	440,955.52
Auburn Light, Heat and Power Co., accounts payable..	21,313.31
Auburn Subway and Electric Co., notes.....	64,109.69
Auburn Gas Co., debentures.....	25,000.00
Auburn Gas Co., notes	23,000.00
Auburn Gas Co., accounts payable.....	5,905.63
Seneca Falls and Waterloo Gas Light Co., notes.....	5,000.00
Seneca Falls and Waterloo Gas Light Co., accounts payable	8,101.78
Inter-Urban Gas Co., accounts payable.....	19,218.89
Geneva Gas Improvement Co., bonds.....	300,000.00
Citizens Light and Power Co., accounts payable.....	9,327.69

Total	\$1,229,932.51
Add to this bonds outstanding which are to be refunded.	984,000.00

\$2,213,932.51

Add to this amounts hereinbefore specified for improvements and extensions	173,726.30
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\$2,387,658.81

Deduct from this proposed bond issue.....	2,233,000.00
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Amount of indebtedness reduced (no account taken of Citizens Light and Power Co. bonds).....	\$154,658.81
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With property improved to the extent of \$173,726.30.

Total reductions effected:

Stock	\$715,000.00
Bonds and other debt	154,658.81

\$869,658.81

The fixed capital accounts as stated in the petition show as of December 31, 1910, the following for the various gas and electrical companies:

Inter-Urban Gas Co.	\$382,510.88
Seneca Falls and Waterloo Gas Light Co.	174,867.35
Auburn Gas Co.	1,225,327.86
Auburn Light, Heat and Power Co.	1,078,885.21
Citizens Light and Power Co.	None.
Auburn Subway and Electric Co.	139,253.97
	<hr/>
	\$3,000,845.27

This exceeds the total indicated capitalization for the new company of \$2,833,000 by \$167,845.27, and is exclusive of the stated values of materials and supplies on hand and also disregards accounts receivable and accounts payable. Our engineer has examined with some detail the Auburn Light, Heat and Power and the Auburn Subway and Electric companies and estimates the present depreciated value of the physical properties to be \$659,360. We have no detailed report for the other properties. While it is evident that the fixed capital accounts do not show the actual present values and it appears that one or more include the franchises without specification of their estimated value, we are satisfied that the location of these properties in Auburn, Geneva, Seneca Falls, and Waterloo, and the amount of business transacted, do not justify us in denying these applications on the ground that this new capitalization would largely exceed the real value of the properties. The various steps embodied in the titles of these cases indicate clearly a reorganization with a squeezing out of a large amount of water from the securities as shown above.

The combined earnings after paying for operation of these gas and electrical companies for the year 1910 were \$145,694.52. The interest at 5 per cent on the proposed bonded debt, \$2,233,000, would be \$111,650, leaving on the basis of last year's earnings a surplus of \$34,044.52 for corporate purposes. There are, however, outstanding, and will

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continue to be under this scheme, the two underlying mortgage bond issues: of the Geneva Gas Company \$10,000, and Seneca Falls and Waterloo Gas Light Company \$53,000, the interest upon which at 5 per cent reduces that surplus to \$30,894.52. The operating income and net earnings should be very considerably increased under the economies resulting from the proposed mergers.

Any approval of the merging of these properties should be accompanied by a requirement for a complete inventory and appraisal of all of the gas and electric properties here involved by a competent engineer to be approved by the Commission and who shall undertake the work under its direction. Such appraisal should also be submitted to the Commission for its examination and be subject to such revision as the uniform system of accounts and the law may require, and upon the settling of the values the same should be taken as representing the fixed capital account of the new company. The intangible value of the property should be properly stated under its appropriate classification. In that way only can the new company be started fairly.

The Empire Coke Company is organized under the Business Corporations Law to, among other things, manufacture, generate, store, buy, sell, and deliver to any person or corporation at its works or elsewhere, gas, electricity, and electric current. It does now manufacture and sell gas in large quantities to various corporations and is endeavoring by this plan of practical control to largely increase its sale of gas, much of which is now a waste byproduct in the conduct of its larger business of manufacturing coke. As such corporation so engaged in business, it is at least technically a gas corporation and is entitled to take and hold the stock of a gas and electrical corporation.

The Empire Gas and Electric Company is both a gas and electrical corporation duly organized under the Transportation Corporations Law. It is not however engaged at present in the manufacture, sale, or distribution of gas or electricity.

It is seeking to become an operating company by a merger of these various properties into itself. The Commission is not satisfied that this company, which is merely a gas and electrical corporation by virtue of incorporation and not by engaging in business, is such a corporation as is authorized, under subdivision 3 of section 61 of the Transportation Corporations Law and section 15 of the Stock Corporation Law, to merge corporations engaged in supplying the public with gas or electricity. That objection however is easily overcome in this case. If we approve the general scheme of financing and bonding outlined, and permit this new company, the Empire Gas and Electric Company, to take over the entire stock issues and full control of the three Auburn electric properties under the contract with the American Gas and Electric Company, it will be entirely practicable for the Empire Gas and Electric Company to acquire these properties actually by deed. It will then be a gas and electrical corporation actually engaged in the manufacture, distribution, and sale of electricity. In the opinion of the Commission this would qualify the Empire Gas and Electric Company to merge with itself the other corporations under the above quoted sections of the Transportation Corporations Law and the Stock Corporation Law.

Besides the economies resulting from the very large reduction of liabilities and of capitalization as presented in the scheme here worked out, there should be much additional economy secured through common direction and management and the use of this low priced gas for fuel purposes by electrical companies as well as distribution of the gas for lighting purposes by the gas companies. Something may be said against the proposed scheme on the ground that the gas and electrical corporations in Auburn will be consolidated. It would seem that this objection would be met by the increased ability of the new company under largely increased net returns to improve the property and to keep the price of both gas and electricity down to a fair rate. Moreover,

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it is a fact that whether there is competition between gas companies and electrical companies for lighting purposes or not, the rates for electricity and for gas are usually fixed more with a view to securing and maintaining a consumption which is in large measure peculiar to each. Electricity is used for light and power, while gas is used most largely for fuel purposes though to a considerable extent for light. The preference of electricity for lighting purposes has become well established.

Under the form of joint mortgage presented the certification of bonds over and above \$2,700,000 is limited as to the balance, namely, \$2,300,000, to an amount of principal equal only to 80 per cent of the reasonable value, not exceeding cost, of the betterments, improvements, developments, extensions, or additions to the properties as certified by an engineer, as provided in the mortgage, and only provided that the total net earnings of the mortgagors for the twelve consecutive calendar months within the thirteen calendar months immediately preceding any application for a certification and delivery of additional bonds shall be in the aggregate not less than one and three-quarters times the annual fixed charge of bonds already outstanding under the mortgage and upon all underlying bonds and upon the bonds then applied for and not less than twice such interest charge before an improvement fund is deducted as provided in the mortgage. This improvement fund consists of setting aside annually a sum equal to 2 per cent of the aggregate principal amount of all bonds issued and outstanding on the 1st day of March in each year, such fund to be applied by the mortgagors for betterments, improvements, developments, extensions, and additions to the plants or properties, but in no case to be expended for ordinary repairs and renewals. The fund is to be cumulative, and if the amount so set aside in any one year shall not have been expended for the purposes to which the fund is applicable, such amount or the unexpended balance thereof is to be deposited with the trustees subject to with-

drawal for improvement or betterment expenditures from time to time as required.

The work of the Commission under sections of the law relating to capitalization and mergers or consolidations is not merely restrictive. It is also constructive. The Commission's powers of revision or restriction with those relating to approval or disapproval enable it in many cases, by advice as well as by ruling, to bring about effective reorganizations upon bases fair alike to the public, the companies as corporations, and the holders of securities involved. This constitutes a valuable function of government which should be exercised when and to the extent it may be practicable. The case in hand is an example.

The Commission should:

1. Permit the Inter-Urban Gas Company, which now owns all of the capital stock of the Seneca Falls and Waterloo Gas Light Company, to merge with itself the Seneca Falls and Waterloo Gas Light Company, and also approve the merger hitherto made of the Geneva Gas Company with the Inter-Urban Gas Company.

2. Permit the Empire Gas and Electric Company to issue its capital stock in the amount par value of \$600,000 and sell the same to the Empire Coke Company, receiving as a consideration therefor the stocks held by the Empire Coke Company of the Auburn Gas Company and the Inter-Urban Gas Company aggregating in par value \$610,000, and also permit the Empire Gas and Electric Company to take over in further consideration for the transfer of its stock the assignment of the rights of the Empire Coke Company in and under the contract with the American Gas and Electric Company.

3. Consent to the execution of the proposed \$5,000,000 joint first and refunding mortgage by the Empire Gas and Electric Company and the Empire Coke Company, subject however to such revision of the said proposed mortgage as will provide —

(a) That no bonds shall be issued thereunder for extension or improvement of the property of the Empire Coke Company or for maintenance of its plant or business or for acquisition of property by that company, and that all bonds to be issued under said mortgage shall be solely for and on account of the lawful purposes of the Empire Gas and Electric Company;

(b) That the issuance and sale or disposition of bonds under the said mortgage shall, any provisions therein to the contrary notwithstanding, be subject to the approval of the Public Service Commission for the Second District, State of New York, or such other body as may be hereafter duly empowered with respect thereto under the laws of the State of New York;

(c) A copy of said mortgage when duly executed, together with a statement showing compliance with these requirements, shall be filed with the Commission as part of its record in this proceeding.

4. Permit the Empire Gas and Electric Company under the contract with the American Gas and Electric Company under the assignment thereof as above provided to purchase the stocks of the Auburn Light, Heat and Power Company, Auburn Subway and Electric Company, and Citizens Light and Power Company, paying therefor the sum of \$605,000 in cash to be obtained by the sale of bonds as hereinafter provided, and also \$300,000 of the first preferred stock or income bonds of the Empire Coke Company as and for the purposes of the latter company in its contract with the American Gas and Electric Company whereunder the said Auburn electric properties are to be practically freed from debt, the said preferred stock or income bonds to be acquired from the said Empire Coke Company by the Empire Gas and Electric Company in exchange for bonds to the amount of \$300,000 as hereinafter provided. Require the Empire Gas and Electric Company, after the purchase of said stocks of the Auburn electrical companies, to obtain from the said

Auburn electrical companies deeds in fee of their properties, the same being freed from debts as provided in the aforesaid contract, and as a consideration for the conveyance of the properties to surrender the stocks of said electrical companies together with such further nominal consideration as may be by law required, the said transfer by deed being by the Commission herein approved.

5. Permit, as the next step, the Empire Gas and Electric Company to merge into itself the Inter-Urban Gas Company.

6. Permit, as the next step, the Empire Gas and Electric Company to merge into itself the Auburn Gas Company.

7. Permit the issuance by the Empire Gas and Electric Company and the Empire Coke Company of bonds under the said joint first and refunding mortgage of a total amount of \$2,253,000 as and for the following purposes, and according to the amounts stated in respect thereto and for no other purpose whatsoever, subject however to the conditions stated below:

I. Said bonds in par value to the amount of \$984,000 to be certified and held in reserve by the trustee for the purpose of refunding at par exchange the outstanding bonds of the Empire Coke Company and the Inter-Urban Gas Company and the Auburn Gas Company, as follows:

a. Joint first mortgage 5 per cent bonds of the Empire Coke Company and the Inter-Urban Gas Company aggregating in bonds now outstanding \$438,000.

b. First mortgage 5 per cent sinking fund bonds of Auburn Gas Company aggregating in bonds now outstanding in the hands of the public \$257,000.

c. First consolidated mortgage 5 per cent bonds of Auburn Gas Company aggregating in bonds now outstanding \$289,000.

II. Bonds under said joint first and refunding mortgage to the amount of \$1,249,000 to be issued and used solely as follows:

a. Said bonds to the amount of \$300,000 face value to be paid to the Empire Coke Company upon issuance by the said Empire Coke Company to the Empire Gas and Electric Company of its 6 per cent cumulative income bonds for a like amount, \$300,000; or at the option of said Coke company its 6 per cent first preferred capital stock for a like amount, \$300,000; the said bonds so issued under said joint first and refunding mortgage to be used by the Empire Coke Company for the acquisition of \$300,000 bonds outstanding of the Geneva Gas Improvement Company, the same to be pledged as security under said joint first and refunding mortgage.

b. A sufficient amount in face value of said bonds to produce when sold at not less than 85 per cent of the par value thereof \$605,000, and the proceeds from the sale of said bonds, together with \$300,000 of the said income bonds or preferred stock of the Empire Coke Company so as above required, shall be paid by the said Empire Gas and Electric Company to the American Gas and Electric Company as and for the capital stocks of the Auburn Light, Heat and Power Company, Auburn Subway and Electric Company, and Citizens Light and Power Company, which together aggregate \$625,000 in par value, as and for the payment and discharge of the various debts of the said Auburn Light, Heat and Power Company, Auburn Subway and Electric Company, and Citizens Light and Power Company by the American Gas and Electric Company, in full accordance with the provisions of the contract annexed to the petition in this proceeding between the said American Gas and Electric Company and the Empire Coke Company.

c. Said joint first and refunding mortgage bonds to the amount of \$25,000 with which to pay for and secure the cancellation of \$25,000 Auburn Gas Company debentures issued under order of this Commission of December 16, 1909, such new bonds to be issued and used without discount.

d. A sufficient amount in face value of said joint first and refunding mortgage bonds to produce when sold at not less than 85 per cent of the par value thereof \$61,226.30, and the proceeds from the sale of said bonds shall be used to pay off and discharge accounts and bills payable duly set forth in schedules attached to the petition herein of Auburn Gas Company, Seneca Falls and Waterloo Gas Light Company, and Inter-Urban Gas Company.

e. A sufficient amount in face value of said joint first and refunding mortgage bonds to produce when sold at not less than 85 per cent of the par value thereof \$6950, to cover the necessary payment of mortgage recording and incorporation taxes.

f. A sufficient amount in face value of said joint first and refunding mortgage bonds to produce when sold at not less than 85 per cent of the par value thereof \$75,000, and the proceeds from the sale of said bonds to take the place of \$75,000 debentures of Auburn Gas Company heretofore duly authorized by order of the Commission of December 16, 1909, for extensions and improvements, the said authorization for the issuance of debentures to be abrogated by separate order of the Commission so far as it relates to the issuance of said unissued debentures to the amount of \$75,000.

g. A sufficient amount in face value of said joint first and refunding mortgage bonds to produce when sold at not less than 85 per cent of the par value thereof \$37,500, to cover the purchase of two Curtis turbo generators and accessories as provided for in the contract between the American Gas and Electric Company and the Empire Coke Company.

h. The discount on bonds to be sold at not less than 85 per cent of par value as applied to the foregoing items in subdivisions *a*, *d*, *e*, *f*, and *g*, of subdivision II of paragraph 7, is herein stated to be \$138,600 upon a maximum total issue of said bonds as covered by said subdivisions of \$924,000. No bonds shall be sold or used for purposes

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specified in subdivisions *c*, *d*, *f*, and *g* hereof until after merger of the companies affected with the Empire Gas and Electric Company.

8. Require the said Empire Gas and Electric Company, immediately after the acquisition and merging of the said properties as hereinabove provided, to have made by a competent engineer, whose name shall be first submitted to and approved by the Commission, an inventory and appraisal of each and every of the properties so taken over by the Empire Gas and Electric Company, the same to be made under direction of the Commission and to be thereafter submitted to the Commission for examination and approval or correction, and thereupon the said Empire Gas and Electric Company shall correct its fixed capital and other accounts in necessary accordance therewith.

9. Provide that the order covering the disposition of these cases shall not become effective until acceptance thereof in writing shall be filed with the Commission by the Empire Coke Company and the Empire Gas and Electric Company, which said acceptance shall be so filed on or before the 25th day of July, 1911.

32 RESIDENTS OF CANISTEO v. ERIE RAILROAD CO.

P. S. C., 2d D.

In the Matter of the Complaint of RESIDENTS OF THE VILLAGE OF CANISTEO AND VICINITY *against* ERIE RAILROAD COMPANY, relative to certain passenger trains not stopping at Canisteo station.

Where the local service furnished by a railroad company is inadequate, through trains will be ordered to stop to accommodate the local travel.

Submitted May 1, 1911. Decided July 12, 1911.

Almon W. Burrell for complainants.

T. H. Burgess for respondent.

OLMSTED, *Commissioner*:

The village of Canisteo is located four miles east of the city of Hornell on the main line of the Erie railroad. It has a population, according to the census of 1910, of 2258: an increase of 181 since the census of 1900. It has several manufactories and is a thriving village.

The passenger train service on the Erie railroad passing through the village at the present time is as follows:

Eastbound:

	No. 4 a. m.	No. 8 p. m.	No. 48 p. m.	No. 6 p. m.	No. 2 a. m.	No. 26 p. m.	No. 264 a. m.
Hornell	6:57	9:00	8:00	11:15	10:52	4:02	6:00
Canisteo . . . . .	....	....	8:10	....	....	4:10	6:08

Westbound:

	No. 1 p. m.	No. 3 p. m.	No. 5 a. m.	No. 7 a. m.	No. 47 a. m.	No. 25 a. m.	No. 35 p. m.	No. 19 p. m.
Canisteo ....	....	....	....	8:13	9:50	10:57	3:30	11:28
Hornell	5:36	12:00	4:42	8:25	10:00	11:05	3:40	11:38

This table shows all trains passing through the village, with the time given for those which stop; those that do not stop are shown in blank. The complainants in this proceeding ask that the following trains be stopped at Canisteo:

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Eastbound:

	No. 4	No. 2
	a. m.	a. m.
Hornell	6:57	10:52
Canisteo	7:07	11:02

Westbound:

	No. 1
	p. m.
Canisteo	5:26
Hornell	5:36

In the foregoing table the time of arrival at Hornell is shown in each case, and the approximate time when the train would stop at Canisteo, if stopped there by order of the Commission, is also shown.

In 1908 complaint was made to the Commission asking that trains Nos. 4 and 2 eastbound, and No. 1 westbound, be stopped at Canisteo; and in addition it was asked that train No. 47 westbound should also be stopped there. This proceeding never came to a final disposition. Before such disposition was made the Erie voluntarily stopped train No. 47 westbound and train No. 2 eastbound, and the complainants did nothing further in the matter. This schedule continued until December, 1910, when the respondent discontinued the stop of train No. 2 eastbound; whereupon the present proceeding was begun.

The reasons for and against the stopping of trains, as shown by the testimony, are as follows:

Train No 4, eastbound: This leaves Hornell at 6:57 in the morning and arrives at Canisteo at 7:07. It is a through train from Chicago and Cincinnati to New York, and is said by the respondent to be the best train operated between those points by the Erie Railroad Company; representing on the Erie road the Twentieth Century Limited on the Central and Lake Shore. Complainants state that there are a number of traveling men residing in Canisteo, or who come there on business connected with the manufactories at that place, who would take this train out in the morning and would find it

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more convenient than train No. 264, eastbound, which leaves Canistee at 6:08 a. m. Train No. 4 would give an hour's more time for rising, getting breakfast, etc., in Canistee. The respondent replies as to this particular train, that persons desiring to leave Canistee in the early morning can take train No. 264 which leaves at 6:08 a. m., and which is a local train, and can travel on it as far eastward as may be necessary to reach the first stop of train No. 4 following directly after. This would probably be at Addison or Corning. At that point the passenger desiring to go to New York on train No. 4 can take it and proceed on his journey, the only inconvenience to the people of Canistee being that they would be obliged to get up an hour earlier in the morning and to change cars at some point east of Canistee.

It is also urged by the respondent that if travelers in Canistee desire, they can go to Hornell on the local trolley and catch train No. 4 at 6:57 a. m. when it leaves that city. This, however, would require them to leave Canistee only twenty minutes later than would be necessary to take train No. 264 at Canistee leaving at 6:08 a. m.

There was no testimony that train No. 4 would accommodate any passengers coming into Canistee on foreign railroads. The New York and Pennsylvania railroad runs a morning train to Canistee from Greenwood, Rexville, Whitesville, Geneseo, Ellisburg, Oswao, Shingle House, and some other small stations. It does not arrive at Canistee until 8:59 a. m., about two hours after train No. 4 has left for the east.

Train No. 2, eastbound, leaves Hornell at 10:52 a. m. and passes Canistee at approximately 11:02 a. m. This is the train that for some years was stopped at Canistee and is the one about which the principal contention is made.

It will be seen from the schedule that the first eastbound train from Canistee leaves at 6:08 a. m., and there is no other train going east from Canistee until 4:10 p. m., when train No. 26 leaves. After that there is one further train to

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the east at 8:10 p. m. So that for ten hours, comprising the entire business part of the day, Canisteo is without train service to the east. It would seem that this fact alone warrants stopping train No. 2 at Canisteo, and that no further reason need be given.

Under the rules of train service laid down by this Commission in the case of *Board of Trade of Dansville v. The Delaware, Lackawanna and Western Railroad Company*, 1 Second District P. S. C. Rep., 376, and in *Residents of Marathon v. The Delaware, Lackawanna and Western Railroad Company*, decided May 12, 1909, there is no question but that a railroad should furnish better local service than this.

The respondent was asked on the hearing whether any more economical method could be devised of getting better east-bound service than by stopping train No. 2, and replied that none other could be suggested although the matter had been given careful attention by the officials of the Erie railroad. It was further stated in answer to the same question that investigations were in progress which might result in a better schedule eastward out of Canisteo due to the completion of trolley lines farther eastward on the road, but no definite proposal of what would be done was presented by the respondent.

The evidence shows that there are some people — not a large number — who reach Canisteo at 8:59 in the morning by the New York and Pennsylvania, and wish to go eastward. They are unable to do this without going to Hornell by the trolley and retracing their journey back again by train No. 2 after it leaves Hornell at 10:52.

The complainants also show that aside from the regular travel that may be expected from a village like Canisteo toward the east to points on the Susquehanna division, especially Addison and Corning, there are a number of people who desire to take a train for New York and points between Canisteo and New York; that they ought to be given reason-

able accommodation in getting there and not be obliged to leave as early as 6 o'clock in the morning in order to make these points.

The respondent urges that this train is run in competition with the Empire State Express on the New York Central; that it was found that it had difficulty in making its time to New York city, and that therefore several stops were cut out between Buffalo and New York, Canisteo being one of the number. The reasons given by the Railroad company for taking out the stop at Canisteo are that very few people patronize the train, and that the receipts from Canisteo in the aggregate for all trains east- and westbound were not much over \$10,000 a year; that people in Canisteo desiring to take train No. 2 can do so by leaving Canisteo on train No. 47 westbound, which leaves Canisteo at 9:50 a. m. and arrives at Hornell at 10 a. m., giving fifty-two minutes in which to catch train No. 2 eastbound; or they can take the trolley from Canisteo, go to Hornell and catch the train at its leaving time in the morning.

The complainants assert that to go from Canisteo to Hornell by the Erie or by the trolley and return over the same route means additional expense and trouble to them which ought not to be placed upon them. The fare on the Erie road from Canisteo to Hornell is 15 cents and the trolley fare is 10 cents, making a total of 25 cents additional expense. They further state that train No. 47 is apt to be late, and so late that there is not time to catch train No. 2 eastbound at Hornell; that people are afraid to rely upon the connection, and when they go usually take the trolley in preference to train No. 47. The trolley cars run between Canisteo and Hornell between 6:20 in the morning and 11:30 at night on a headway not to exceed one hour, and sometimes on less headway than that. The distance by trolley is five miles; the running time is from thirty to thirty-five minutes.

The respondent claims that the position of the residents of Canisteo is no different from that of the residents of any city

who have to travel ordinarily for a period of from twenty minutes to a half hour in order to reach the local station. While this may be so, it still is apparent that Hornell and Canisteo are separate communities and entitled to their individual and separate train services.

The question of expense and delay of stopping train No. 2 was also brought out in the evidence by respondent, but the expense was not insisted upon and the delay was stated to be five minutes.

The Commission has many times asserted its belief that the average train-stop of a train of the character of No. 2 is not to exceed three minutes from speed to speed, and it was not shown by the respondent upon the hearing that a delay of three minutes at Canisteo would in anywise materially interfere with the running of the train from Buffalo to New York. The making of through time was all that was insisted upon by the respondent on the hearing.

The other train asked to be stopped by the complainants is train No. 1, which passes Canisteo at 5:26 p. m. and reaches Hornell at 5:36 p. m. This is the opposing train to train No. 2, and is run between New York and Buffalo on the Erie to compare with the Empire State Express on the Central. It is a through by daylight train. The reasons for stopping it as given by the complainants were that a number of people residing in Canisteo do business in Bath, where a number of county institutions are located, and in Corning, which is a principal city, and wish to get home at a reasonable hour in the evening. The only means they have for doing so at the present time is train No. 35, which leaves Corning at 2:08 p. m., passes Canisteo at 3:30, and reaches Hornell at 3:40 p. m. To make use of this train complainants are required to leave Bath and Corning before they have finished their business, and they state that it is much more convenient to wait for train No. 1 and be left at their destination at an hour which is very convenient to them. At the present time train No. 1 does not stop, passes

on to Hornell, arriving there at 5:36 p. m., and they are obliged to come back to Canisteo by trolley at an additional expense of 25 cents, as has been stated above. Any baggage which they may have must also be taken through to Hornell and returned on some local Erie train or be taken over by a baggage wagon, as the trolley line does not take baggage.

It is also shown that there is a train leaving Canisteo on the New York and Pennsylvania at 5:55 p. m., and that when train No. 1 westbound passes through Canisteo this train is standing there ready to receive passengers going south from Canisteo. By the time that these passengers have reached Hornell by the Erie and come back again on the trolley the New York and Pennsylvania train has gone and they are obliged to stay in Canisteo over night and go out the next morning. The respondent answers to this that it is more reasonable for this local road to change its timetable and leave at a time which would accommodate passengers returning from Hornell than to ask the Erie to stop its fast train to make the connection. The reply to this is that if the train leaves Canisteo any later it will arrive very late at Shingle House, which is the terminus of the line. So far as can be ascertained from the facts furnished the Commission on the hearing, the travel which would take this connection is not large, but it is to be considered.

The principal use that would be made of train No. 1, should it be stopped at Canisteo, is by the inhabitants of Canisteo who are doing business on the Susquehanna division, with occasionally a through passenger from New York city and points south of Susquehanna. It was stated that 75 per cent of the traffic in and out of Canisteo is local traffic confined to the Susquehanna division.

The question for the Commission to decide is whether the local train No. 35, which leaves Susquehanna at 10:45 a. m., Binghamton at 11:30 a. m., Owego at 12:16 p. m., Elmira at 1:30 p. m., Corning at 2:08 p. m., Painted Post at 2:13 p. m., Addison at 2:35 p. m., Canisteo at 3:30 p. m.,

Hornell at 3:40 p. m., and stops at all points between Susquehanna and Hornell, furnishes sufficient local service.

After careful consideration of the evidence on this point the Commission is of the opinion that train No. 1 should be stopped on signal for a period of six months, in order that some definite figures regarding its use by the people of Canisteo may be obtained. At the end of that period the Railroad company will be in a position to ask on the record that the stop be discontinued should circumstances warrant. In this connection it is suggested that in case respondent can, by any arrangement with the trolley lines to the eastward as hereinbefore referred to, improve the local service westward in the afternoon so as to give a later local train out of Corning, it would obviate the necessity of stopping train No. 1 at Canisteo.

From a consideration of the evidence we are of the opinion that train No. 4 ought not to be stopped at Canisteo. The business can be well taken care of by train No. 264. Train No. 2 ought to be stopped. Train No. 1 should be stopped on signal for six months, to let off and take on passengers, and a record kept of the travel accommodated.

An order should be entered accordingly.

In the Matter of the Application of THE LONG ISLAND RAILROAD COMPANY, under section 54 of the Railroad Law, for consent to the discontinuance of its established freight station at Hewlett, Nassau county.

The desire of a railroad company which is much more largely engaged in the transportation of passengers than of freight to consolidate the freight operations of expanding small localities where they practically merge physically and become general communities while remaining separate village entities is recognized as having weight, and where this can be done without considerable public inconvenience, while at the same time it appears that the passenger service would be relieved of serious interference so that the net result to the public is beneficial, special applications of that character should receive favorable consideration; but this case does not fall within that rule, and for reasons stated, the petition for leave to discontinue the handling of less than carload freight at Hewlett and to transfer the reception and delivery of such freight to the adjoining freight station at Woodmere is denied.

Submitted February 20, 1911. Decided July 26, 1911.

Joseph F. Keany for the applicant.

Alfred T. Davison for the Hewlett Bay Company, Carleton Macy, Joseph S. Auerbach, and R. W. Stevenson, in opposition. Nineteen others interested entered their appearance in opposition, either in person or by communication.

DECKER, *Commissioner*:

Section 54 of the Railroad Law provides that "No station established by any railroad corporation for the reception or delivery of passengers or property, or both, shall be discontinued without the consent of the public service commission." The Long Island Railroad Company under this provision of law has applied for leave to discontinue the reception and delivery of less than carload freight at Hewlett, a point on its Far Rockaway branch and distant 1.6 miles from Valley Stream on the main line of its Montauk division. The com-

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pany has maintained a general freight and passenger station, with agent, at Hewlett for many years. It does not desire to discontinue the station as a passenger stop or for carload freight business, nor does its proposal involve the taking away of an agent in charge. The petitioner asks leave simply to transfer its less than carload freight business from Hewlett to Woodmere, the next more distant station on this branch from the main line and from New York. Woodmere is stated to be about one-half mile from Hewlett, but this is contradicted by the objectors. By the track distance it is .6 of a mile from the Hewlett passenger station to the Woodmere passenger station, and it is .5 of a mile from the Hewlett freight station to the Woodmere freight station. An engineer called by the objectors testified that the shortest distance by highway from the Hewlett to the Woodmere freight house is 4530 feet (about six-sevenths of a mile), and that the Woodmere passenger station is farther distant by 841 feet. A truckman testifying for the objectors said that the cost of freight cartage from the Woodmere freight house to parts of Hewlett would be twice the present cost of cartage from the Hewlett station, and another witness for the objectors, a builder, claimed that the additional cost of carting would be 50 cents a ton. The latter applies of course to large shipments, and not to small lots of package freight. Precisely what the extra cost would be could not be shown, but it is doubtless a fact that the cost to residents of Hewlett in obtaining their less than carload freight from the railroad station would be increased if the change were made.

Against the inconvenience and greater expense to Hewlett residents which the transfer desired by petitioner would entail, it is urged by the petitioning company that the stoppage of freight trains to unload less than carload freight at Hewlett interferes with the running of its passenger trains, which now are 60 in number per day, and most of them are run upon a fast schedule. The proof is not definite that such interference is now actual to the point of causing serious

delays to passenger trains, but seems rather to indicate the possibility or probability of such interference as the freight business at Hewlett grows and the passenger train facilities are increased. The agent at Hewlett attends to both the passenger and freight business, and no material economy in operation would result from the change beyond saving the cost of stopping the local freight trains at Hewlett.

The general situation at Hewlett and Woodmere should be briefly described. Woodmere is a growing residential locality. Hewlett is the older community. It is also growing both in population and in the number of residences, and the cost of the improved residence locations is stated to run up as high as \$50,000, with a number at \$15,000, and of course others representing a lower cost. The development of Hewlett, which is proceeding somewhat rapidly, is principally on the side away from Woodmere and toward Valley Stream on the main line. Both the passenger and freight houses at Hewlett are old. The stations at Woodmere are comparatively new. The freight station at Hewlett is small and often congested. The freight station at Woodmere is much larger, but it is claimed that combining the less carload freight for both points at Woodmere would produce congestion in the freight house there, and there is some little evidence to support that view. In August, 1910, the less carload business at Hewlett was 226 tons as against 1581 tons in carloads. In November, 1910, the tonnage was less carloads 51 tons, and carloads 3770 tons. These figures relate only to tonnage received. The total tonnage received and forwarded at Hewlett and Woodmere, not divided as between carloads and less carloads, 1904 to 1910 was, by years:

	Hewlett.	Woodmere.
1904	7,710 tons	5,146 tons
1905	10,851 tons	5,805 tons
1906	8,761 tons	29,639 tons
1907	8,320 tons	12,080 tons
1908	6,698 tons	10,711 tons
1909	8,182 tons	15,743 tons
1910 (December excluded)	18,900 tons	17,076 tons

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Petitioner's testimony assumes that about 10 per cent of the traffic is less than carload. With variations due to greater or less building, we may assume that about the same amount of freight business is done at each place, perhaps somewhat more on the average at Woodmere than at Hewlett, though this may change and be the other way on account of the selling of lots and erection of buildings in Hewlett, due largely to the activities of the Hewlett Bay Company, a real estate company which is developing its holdings in that locality.

Upon this Far Rockaway branch, which is 8.6 miles long and runs from Valley Stream on the main line to Hammel, there are nine passenger stations and five freight stations. As at present located these freight stations are Hewlett 1.6 miles from Valley Stream, Woodmere .5 of a mile from Hewlett, Cedarhurst 1 mile from Woodmere, Far Rockaway 1.7 miles from Cedarhurst, and Hammel 3.5 miles from Far Rockaway. If distance were the only element to be considered, there could be no answer to the petition. A distance of one-half mile or one mile to haul freight in less than carloads is not burdensome.

This case, however, is decidedly anomalous. Instead of seeking to abandon a station facility on the ground of too little business and therefore unnecessary cost, which has been the practically invariable basis of abandonment cases, the true reason for this petition is too much and growing business at Hewlett. This is indicated by the fact of the constantly growing tonnage at Hewlett, and the further fact that the present freight station at that point is either now too small or will be in the not distant future, and the consideration that the stoppage of a local freight train simply to throw off a few small lots of freight would not ordinarily interfere with passenger business if the freight train is not run during the times of day usually referred to as rush hours for passengers. If the accommodations for less carload house freight at Hewlett are to be continued, the company will be

compelled in a few years, at least, to enlarge the freight house capacity and perhaps change its location.

The bulk of the Long Island Railroad Company's business is represented in passenger traffic, and this is contrary to the general rule. Its trains are run on fast schedules to accommodate daily riders to and from the city of New York, and adequate service requires the making of frequent stops, so that its passenger stations are necessarily short distances apart. This is true especially in the sections comparatively close to New York city. It does not follow that with such passenger traffic the railroad company must have general freight facilities at every passenger stop, and it must also be recognized that, as the passenger business greatly increases, occasion will arise for the rearrangement not merely of passenger stations but of freight stations to the extent necessary to accommodate fairly the whole business under reasonable and practicable operation. Here we have presented, however, facts which show the long establishment of the Hewlett freight station and the much more recent establishment of the Woodmere freight station, at both of which a good amount of business is transacted. We have no detail showing actual interferences of freight trains at Hewlett with the passenger trains running on the branch, and if we had such showing, it is not supported by further evidence that a switch or siding for freight trains at Hewlett, with change of the freight station to an adjacent location if necessary, is actually impracticable.

The Commission recognizes fully and gives due weight to the wish of the company to consolidate the freight operations of these expanding small localities where they practically merge physically into one general community while remaining separate village entities; and where this can be done without considerable public inconvenience while at the same time it appears that the passenger service would be relieved of serious interference, so that the net result to the public is beneficial, we should give special applications of that char-

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acter favorable consideration. This case does not fall within that rule. Here the public inconvenience would be considerable, the cost of carting freight to the doors of Hewlett residents would be somewhat increased, the two places have not as yet expanded physically into one community and Hewlett is developing more largely away from Woodmere than toward it, the freight station at Hewlett has been established for much the longer time, the stated interference by local freight train service at Hewlett with passenger service is not shown by specific instances but presented rather as an inferential fact, the freight traffic at Hewlett is substantial and is constantly increasing, apparently the station layout at Hewlett may be improved.

For the reasons above expressed, and upon all of the conditions and circumstances shown, the petition should be denied.

In the Matter of the Complaint and Petition of EDWARD S. AGOR for an order directing THE MAHOPAC FALLS RAILROAD COMPANY and THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY to run their cars for the transportation of passengers and property at regular times over the Mahopac Falls railroad.

For the period between 1886 and 1900 the Mahopac Falls railroad was operated in passenger service in compliance with a recommendation made in 1886 by the former Board of Railroad Commissioners. In 1900 the Board of Railroad Commissioners authorized abandonment of the station at Mahopac Mines and as a result the Mahopac Falls railroad was not thereafter operated beyond Mahopac Falls, and in that year the passenger service to and from Mahopac Falls was discontinued by the operating company. Permission for the discontinuance of the Mahopac Falls station as a passenger station was not asked for and obtained by application to the Board of Railroad Commissioners as provided for in the Railroad Law.

Upon complaint that the Mahopac Falls Railroad Company, and the New York Central and Hudson River Railroad Company as the operating corporation, are unlawfully withholding passenger service from Mahopac Falls,

Held: 1. Section 54 of the Railroad Law provides that "No station established by any railroad corporation for the reception or delivery of passengers or property, or both, shall be discontinued without the consent of the public service commission first had and obtained." Prior to amendment of the Railroad Law in 1910, the Board of Railroad Commissioners was named in this section instead of the Public Service Commission. Said section 54 of the Railroad Law applies to the discontinuance of a particular station as a passenger station through abandonment of the entire passenger service as well as it does where the carrier continues its passenger service but seeks to discontinue such service at a single station. The law is aimed against the action itself and takes no account of the manner or method by which the result is obtained.

2. Respondents should provide a minimum southbound morning passenger service from Mahopac Falls and a northbound evening passenger service to Mahopac Falls for a period of not less than six months, and keep accurate account of the number of passengers and ticket receipts and receipts from milk, express, mail, and other revenues derived in

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connection with such service; that such account should include the number of pieces of baggage carried and should also include a statement of the actual cost of operating the morning and evening passenger service. After said period of six months the company is authorized to apply, if it so desire, for leave to discontinue Mahopac Falls as a passenger station. *Citizens of Washington County against Greenwich & Johnsonville Ry. Co.*, 2 P. S. C. (2d) Rep.—cited and applied.

3. So much of the complaint as alleges inadequate freight service held not sustained.

Submitted April 22, 1911. Decided August 7, 1911.

Edward S. Agor, complainant in person, and also represented by his attorney, *P. A. Anderson*.

Alexander S. Lyman for The New York Central and Hudson River Railroad Company.

DECKER, *Commissioner*:

The Mahopac Falls Railroad Company owns a line about two miles long running from Baldwin Place to Mahopac Falls. Its stock is owned by individuals who are all or nearly all in the employ of or are directly connected with The New York Central and Hudson River Railroad Company and The New York and Putnam Railroad Company. The New York Central and Hudson River Railroad Company operates the New York and Putnam railroad under lease, and by consent or general authorization it operates also the Mahopac Falls railroad. The Mahopac Falls Railroad Company was organized under the general railroad law of 1850 as amended. It was incorporated to do a general railroad and passenger business, and originally its line extended from Baldwin Place through Mahopac Falls to Mahopac Mines, in Putnam county. The part of the line from the Falls to the Mines has been abandoned.

The complaint alleges and it fully appears that neither The Mahopac Falls Railroad Company nor The New York Central and Hudson River Railroad Company as operator, provides passenger service on the Mahopac Falls road. Com-

plainant claims that it is the legal duty of this owner and this operator to furnish adequate facilities for regular passenger transportation over the line in question. Baldwin Place is the junction with the New York and Putnam railroad. No application has at any time been presented to this Commission or to the former Board of Railroad Commissioners for leave to abandon the passenger station at Mahopac Falls.

In 1886 a complaint was filed with the former Board of Railroad Commissioners by Thomas T. Hill et al. against The Mahopac Falls Railroad Company, alleging among other things unlawful non-operation of the road in passenger service. The road was then operated by the New York City and Northern Railroad Company. In that case the Board of Railroad Commissioners held that as the road had been built under the general railroad act and its amendments and the company had exercised the power of eminent domain and other privileges delegated in those statutes, a corresponding obligation rested upon the company to give reasonable and good service to the community through which it runs, and that this includes the provision of passenger service throughout each year. It recommended that the Mahopac Falls Railroad Company should run at least one passenger train each way daily connecting with the New York City and Northern morning train south and the afternoon train north, or that the New York City and Northern should run such trains. This recommendation was complied with, and it appears that from 1886 to 1900 passenger service on this line was afforded. In 1900, after abandonment of the station at Mahopac Mines upon authority of the Board of Railroad Commissioners then granted, the track was taken up from the Falls to the Mines. The order of the Board sets forth:

The Mahopac Falls Railroad states that it had concluded to dissolve its corporate existence and to abandon the railroad, but that it would continue its operation to Mahopac Falls if the Mahopac Mines station is abandoned.

The order contained no provision authorizing abandonment of the station at Mahopac Falls as a passenger station, or for discontinuance of the passenger service to and from Mahopac Falls. Notwithstanding this, the Mahopac Falls Railroad Company and The New York Central and Hudson River Railroad Company which some years previous to that time had come into operation and control did do away with the passenger service upon the entire line, as well to Mahopac Falls as to Mahopac Mines, and such service since then has not been resumed. Freight service was continued to and from Mahopac Falls and it is still provided.

Section 54 (formerly 34) of the Railroad Law provides that —

No station established by any railroad corporation for the reception or delivery of passengers or property, or both, shall be discontinued without the consent of the public service commission first had and obtained.

Prior to amendment of the Railroad Law in 1910, the Board of Railroad Commissioners was named in this section instead of the Public Service Commission. This Commission succeeded to all of the powers of the Board of Railroad Commissioners. This section of the Railroad Law was in force in 1900 when the operating company by its own act (and which was not prevented or sought to be prevented by the owning company) discontinued the station at Mahopac Falls as a station for the reception or delivery of passengers.

Respondent contends in effect that the above quoted part of section 54 of the Railroad Law applies only where passenger service is provided on the railroad and is sought to be discontinued at a particular station, and that the discontinuance altogether of passenger service on its Mahopac Falls line is not subject to approval of the Commission, even though such action operates as a practical result to supersede the passenger handling function of the station at Mahopac Falls. The contention is not sound. If a railroad company abandons all passenger service on its line, *ipso facto* it

discontinues each and every station on its line for the reception and delivery of passengers. The law is aimed against the action itself, and takes no account of the manner or method by which the result is obtained.

The conclusion is irresistible that the Mahopac Falls Railroad Company and The New York Central and Hudson River Railroad Company as the operating corporation have been, since the date of discontinuance in 1900 of the station at Mahopac Falls as a passenger station, acting in plain violation of the prohibition in section 54 (formerly 34) of the Railroad Law. However that may be, the real complaint here is that the companies have abandoned the passenger service on this railroad and the proceeding is brought to compel the furnishing of such service.

We held in *Citizens of Washington County against Greenwich & Johnsonville Ry. Co.*, 2 P. S. C. (2d) Rep.—that section 26 of the Public Service Commissions Law prescribes the measure of duty on the part of a railroad company which has not been affording passenger service to places along its line, and such measure is that it shall give a passenger service which is in all respects just and reasonable; that the company in failing to give any passenger service had made it impossible to determine the demand for the service with accuracy sufficient to enable the Commission to determine whether a request for regular service would be reasonable or unreasonable; that it is the carrier's duty to give service adequate to the demand therefor which concededly exists, unless after reasonable trial experience should demonstrate that the cost of affording the facility is so greatly disproportionate to the benefits received by the public as to make its provision wholly unreasonable; and that the company must give a specified train service over its road for a trial period of six months. Passenger service upon that road is being afforded as a permanent facility in consequence of the order issued in that case.

Respondent contends here that the distance from Mahopac Falls to Baldwin Place is only about two miles, and to Lake Mahopac only about two miles, and the service to and from Lake Mahopac is over the Harlem division via Goldens Bridge and ending at the Grand Central Station, New York; that the service on the Putnam division from either Mahopac Falls or Baldwin Place is over the Putnam division which stops at 155th street, where the rapid transit service of New York city must be used. That contention goes, however, merely to a possible lack of public demand for passenger service from and to Mahopac Falls. The residents of Mahopac Falls and vicinity have a railroad there, and if there is any reasonable demand for passenger service to and from Mahopac Falls by that railroad the railroad company must afford it. A railroad company may not arbitrarily separate its business into two parts and while continuing to transact that which yields a profit discontinue that which is handled at a loss. If it desire to discontinue a passenger station section 54 of the Railroad Law must be invoked. If it disregard the statutory requirement for adequate service it is subject to effective regulation. To relieve itself from the burden of conducting the unprofitable part of its business, either passenger or freight, it must show affirmatively that the benefits afforded the public by the service in question are insignificant and in the nature of the particular situation must remain so, while at the same time the cost of the service is so great that it is demonstrably unreasonable to require it. Such cost must appear from the results of operation. The argument in a passenger case should not be predicated partly upon an estimated expense for repairing the road to make it safe for passenger travel as is intimated must be incurred; nor may such argument be based upon mere belief that the public demand for the desired passenger service will be too small for consideration.

In this case we have shown a thriving village of about 400 population, and a section surrounding which probably

increases the number to 800. It has six or seven business places, two churches, and a graded school. A substantial freight business is done by the company for Mahopac Falls. The freight receipts at Mahopac Falls in 1910 were \$14,953.66, and to this are to be added prepaid charges amounting to \$1348.08. Mahopac Falls does more business and has a much larger population than it had when the road ran to Mahopac Mines or at any time during the 14 years when passenger service was afforded on this line. It was testified that there would be four or five daily riders by its line to various points on the other divisions. How many more could not be approximated. How much local business there would be, or how much the through business would amount to after a period of actual operation, can not be even estimated. All we have to consider is a community and a railroad. We do know by general estimate that the passenger business in and out of Mahopac Falls by this stub line from Baldwin Place would not, for a time at least, be profitable to the company. The test however is not whether it will be profitable, but whether the service desired will be substantial and whether it is liable to increase or decrease in the future. There is nothing of consequence before the Commission throwing light upon those matters, and after the withholding of passenger service for 11 years there can not be, until the service is tried fairly for a reasonable period.

The ruling of the Commission in the Greenwich & Johnsonville case properly applies here. The respondents, The Mahopac Falls Railroad Company and The New York Central and Hudson River Railroad Company, as the operating corporation undertaking to discharge the common carrier obligations of the owning company, should be ordered to provide on this line as a minimum a southbound morning passenger service from Mahopac Falls and a northbound evening passenger service to Mahopac Falls for a period of not less than six months beginning not later than September 1st next; and to keep accurate account of the number of passen-

gers carried in each direction on each train between Mahopac Falls and all stations respectively, naming the stations or places to and from which tickets for such passengers are sold, the receipts represented in all tickets sold, stating the same not only for the Mahopac Falls road and for all roads in the New York Central system, but for all lines covered by the ticket sales, stating also each kind of ticket, including mileage, commutation and excursion tickets, and also the cash fares. Such account should also include the statement of receipts from any milk or express or mail that may be carried, and all other revenues of the train. The account should also cover the number of pieces of baggage carried by months. The operating company should also keep accurate account of the actual cost of operating such morning and evening passenger service, and in installing the service care should be taken to adopt the most economical method consistent with reasonably adequate accommodation of passengers. This service should be so arranged that it will connect with morning and evening trains at Baldwin Place or elsewhere on the Putnam or Harlem divisions as the carrier may deem best suited to its operations and the public needs.

It is stated on this record that in the event of passenger service on this line being required the Mahopac Falls Railroad Company may institute dissolution proceedings and as a result the entire line operation would be abandoned, thus depriving Mahopac Falls of its freight service as well as avoiding the giving of passenger service to that place. We can not assume that such threatened action will be taken. If such proceedings are commenced, or if simple abandonment of the line takes place, the citizens of Mahopac Falls must meet that contingency. Under this complaint the Commission simply holds, as it must, that the owning company, and the operating company as discharging the legal obligations of the owner, are bound to supply a passenger service on this line until by proper affirmative showing it is made to appear that requiring such service is wholly unreasonable and unjust. The

only possible method of demonstration is by actually affording the service itself. So doing implies a hardship upon the companies here involved, particularly the operating company, but it is one which was assumed voluntarily when the Mahopac Falls station was discontinued for passenger service without lawful authority. The service here required should be continued for such time after the six months period fixed for the trial as will enable the company to apply, if it so desire, for leave to discontinue Mahopac Falls as a passenger station, and the Commission to rule upon the application.

The complaint also alleges inadequate freight service. Upon this branch of the case the complaint is not sustained. Carload freight is delivered properly. The less than carload freight comes and goes by the local "pick up and drop" train on the Putnam division. This and other trains on that division do not run on schedule, and sometimes when the train is very late less than carload freight is carried at night through to Putnam Junction and brought back to Baldwin Place and thence up to Mahopac Falls in the morning. This is not ideal operation, but it occurs seldom, and as a matter of fact the arrival of such freight late at night at Mahopac Falls accommodates no receiver at that point. If the operating company continues to render the present freight service at Mahopac Falls on this stub and branch with few intermissions such as just described, no improvement seems practicable or required.

An order embodying the foregoing determination will be entered

In the Matter of the Application of the BUFFALO, ROCHESTER AND EASTERN RAILROAD COMPANY for a certificate of public convenience and a necessity under section 9 of the Railroad Law, and for permission to begin construction and to exercise franchises under section 53 of the Public Service Commissions Law.

The Buffalo, Rochester and Eastern Railroad Company is a railroad corporation organized under the laws of the State of New York, the route of its proposed road extending from Buffalo on the west to Troy on the east, paralleling the road of The New York Central and Hudson River Railroad Company, the distance between the two roads varying from five to fifteen miles. Its application for a certificate of public convenience and a necessity under former section 59, now 9, of the Railroad Law, and for permission to begin construction and to exercise franchises under section 53 of the Public Service Commissions Law, was denied by this Commission March 15, 1909.

The opinion of the Commission upon the denial of such application is reported 1st P. S. C. Reports, 532.

Pursuant to section 22 of the Public Service Commissions Law, the company applied for a rehearing, which was granted. Upon such rehearing the Commission holds and decides as matters of fact:

1. That a reasonable and fair estimate of the cost of the railroad proposed to be constructed by the applicant is not less than the sum of \$100,000,000.

2. That the principal purpose proposed to be served by the proposed road is the conveyance of through freight across the State of New York, received at Buffalo and the Niagara Frontier from points west of Buffalo and received at Troy from points east of Troy. That a part of the purpose of the said road is the serving of the localities through which the road would pass between the cities of Buffalo and Troy in the carriage of freight and passengers, but that it is not estimated or claimed by the applicant that the receipts therefrom would amount to more than practically one-tenth of the total receipts of the road.

3. That the existing railroad facilities for the carriage of through freight and passengers across the State of New York afforded by the various railroads engaged in that service are now adequate for existing business, and in the judgment of the Commission, based upon the record

of this case and present general knowledge, the service and facilities which can be furnished by said existing railroads will be adequate for increase in such business during a reasonable future period.

4. That the facilities afforded by the existing railroads for the accommodation of local freight and passenger business across the State of New York along and in the vicinity of the line of the proposed road are adequate for the transaction of all existing business. That the construction of the proposed road would be a greater convenience to those communities through which it would pass which are nearer to its proposed line than to the lines of existing railroads than are such lines of existing railroads; but that such greater convenience is not enough to make the proposed road as a whole a public necessity.

5. That the business which could be obtained by the proposed road if it were constructed would not be sufficient to pay operating expenses and a reasonable return upon the capital invested in such construction; and that the road, by reason of its inability to procure sufficient remunerative business, would necessarily be bankrupt from the outset.

6. That the applicant has failed to show financial ability, resources, and connections sufficient to justify the belief that it could construct its proposed road.

7. That upon all of the facts shown by the evidence taken the Commission is unable to find that the said proposed road is a public convenience and a necessity.

Upon such findings of fact the application is denied.

Submitted March 16, 1911. Decided August 7, 1911.

Henry W. Ely and Frank S. Black for the applicant.

Thomas D. Watkins and Alexander S. Lyman for The New York Central and Hudson River Railroad Company, West Shore Railroad Company, The Lake Shore and Michigan Southern Railway Company, and The Michigan Central Railway Company.

Lewis E. Carr for The Delaware and Hudson Company.

F. W. Thomson for The Delaware, Lackawanna and Western Railroad Company.

Edward Welch for the Delaware and Eastern Railway Company.

Kenefick, Cooke, Mitchell & Bass for the Lehigh Valley Railroad Company.

George F. Brownell for the Erie Railroad Company.

Daniel M. Beach for the New York State Railways.

All of the appearances other than those of the applicant being in opposition to the application.

STEVENS, Chairman:

The Buffalo, Rochester and Eastern Railroad Company, a railroad corporation organized under the laws of this State in 1907, filed with this Commission its petition asking that the Commission, pursuant to then section 59, now section 9, of the Railroad Law, grant to it a certificate of public convenience and a necessity for the construction of its proposed road; and also that pursuant to section 53 of the Public Service Commissions Law the Commission give its permission and approval to the construction of such proposed road and the exercise of the franchise and right conferred upon it by the provisions of the Railroad Law to operate as a railroad corporation.

A large number of hearings were had upon this application, which was opposed by several other railroad corporations, with the result that on the 15th day of March, 1909, the application was denied. Thereafter, and about December, 1909, the petitioner, pursuant to section 22 of the Public Service Commissions Law, applied to the Commission for an order granting a rehearing upon the whole case. Such rehearing was granted by the Commission, and on February 2, 1910, hearings were commenced and continued from time to time, until the whole matter was submitted upon briefs and oral argument on the 16th day of March, 1911.

The application of the petitioner is opposed by the following railroad corporations: The New York Central and Hudson River Railroad Company, West Shore Railroad Company, The Lake Shore and Michigan Southern Railway Company, The Michigan Central Railway Company, The Delaware, Lackawanna and Western Railroad Company, Delaware and Eastern Railway Company, Lehigh Valley

Railroad Company, The Delaware and Hudson Company, Erie Railroad Company, New York State Railways.

The record made is exceedingly voluminous, embracing upward of 5500 pages of oral evidence, and a very large number of exhibits some of which are volumes in themselves. Notwithstanding its familiarity with the case by reason of the first hearing, the Commission has felt that the proper discharge of its duty required it to make a careful reëxamination of the many matters involved, to the end that if it had erred in its former decision such error might be corrected at this time.

The following is a summary of the reasons urged by the petitioner why the application should be granted:

1. Inadequacy of existing facilities to meet present demands of business within the territory to be served by the proposed road.
2. Extension of railroad facilities to communities not now possessing such facilities.
3. The necessity for providing for the growth of business, especially of traffic in grain and other products of the Northwest.
4. The benefits of competition in procuring prompt and adequate service, reasonable rates, and in developing business by reason of additional facilities afforded.

The position taken by the objecting roads may be summarized as follows:

1. That the service within the territory which would be served by the proposed road is now adequate and efficient.
2. That the objectors will be able to provide facilities in the future capable of serving all the business which may be offered.
3. That the earnings yielded by the proposed road would be insufficient to afford any return upon the capital invested, and that this fact would inevitably produce insolvency with all its attendant disastrous consequences.

4. That the competition which would be offered by the proposed road, if it were constructed, would be destructive and of injury to the public by forcing a useless war between an insolvent corporation and solvent corporations.

5. That the applicant has wholly failed to show any financial ability to construct the proposed road.

It is clear that the decision of the Commission upon the issues raised by the foregoing contentions must depend upon the facts found by it from the immense array of evidence presented for its consideration. Its first decision was based upon some eighteen distinct findings of fact which are set forth at the conclusion of the opinion delivered at that time. Section 9 of the Railroad Law provides, as did section 59, that after refusal to grant a certificate of public convenience and a necessity, the defeated applicant may appeal to the Appellate Division of the Supreme Court which shall have power, in its discretion, to order the Commission, for reasons stated, to issue the certificate, and it shall be issued accordingly. If the facts found by the Commission warranted the issuance of the certificate, it would have been easy for the applicant to have satisfied the Appellate Division of the propriety of directing the Commission to issue the certificate as desired. By applying for a rehearing it practically acknowledged that the facts plainly found by the Commission did not warrant the issuing of the certificate, and its efforts during the prolonged rehearing have been directed to the end of convincing the Commission that in several respects its former findings of fact were incorrect and should be reversed.

This view is clearly supported by remarks of counsel in applying for a rehearing. He says, "It is our understanding from reading and studying the opinion of the Board, that there were four or five fundamental difficulties with our case. In the first place, following somewhat the order of the opinion, was the cost of the road. Then there was the question of where we were going to get the business; and third, if we obtained the business, what we were going to do with it when

we got the freight, for instance, to port. And then there was the other question, and the underlying and important one, of where we were going to get the money. And although it is worded in several different ways in our petition, it is with reference to all these fundamental propositions that we wish to be heard. . . . In short, on all of the fundamental propositions, which are really only four or five, and they really are fundamental, we wish to introduce additional evidence of living witnesses based upon the condition not only as it was then, but new evidence which in the months which have intervened has turned up to us. All evidence must be more or less cumulative, at the same time it is new and illuminating evidence."

It is not purposed in this opinion to review in detail the evidence which was offered upon the first hearing, and upon which it based its findings of fact as set forth in its opinion handed down at that time. Much of that evidence has been reintroduced upon this hearing and is before us for consideration. Considering that evidence by itself we have found no occasion to change our views regarding its force and effect and the conclusions of fact which should be drawn from it. The form which the consideration of the case must take at this time is whether the new evidence adduced upon the present hearing is of such force and cogency as in any manner to change the decision of the questions of fact.

PURPOSES DESIGNED TO BE SERVED BY THE PROPOSED ROAD

There can be no intelligent consideration of the merits of this application without a clear comprehension of the purposes which the proposed road is designed to serve, and whether it is so planned and designed that it will accomplish those purposes. If it be assumed that the public is in need of certain transportation facilities which it does not now possess, it by no means follows that the construction of the proposed road would afford those facilities. If it be assumed that there are congestions and delays upon the lines of exist-

ing roads, it would still remain to be shown that the proposed road would relieve such congestions and delays and provide the facilities required by the public. In the former opinion in this case a somewhat careful and detailed description of the proposed road, of its termini and connections, was given. It is unnecessary to repeat such description in detail at this time. A brief summary is all that is now required.

The applicant proposes to construct a modern two-track road from the city of Troy to the city of Buffalo, a distance of 297 miles. Its eastern rail connection is to be the Boston and Maine railroad at Troy; its western rail connections will be the roads using the International Bridge across the Niagara river at Buffalo, and incidentally all of the western roads terminating at Buffalo.

In our former opinion we used the following language:

It is a fair and just statement that the real purpose of the applicant company is to construct a line the chief business of which would be to move to the East freight originating at or west of Buffalo, and to move to the West freight originating at or east of Troy.

This statement has not been challenged, but its truth is of such great importance that it may be well to present some of the facts upon which it is based.

1. The engineer locating the road testifies that the principal idea in making the location was to have a through line to connect with the Grand Trunk at Buffalo and with the Boston and Maine at Troy, by the shortest possible distance: the idea being mainly a through line and that the serving of local business was merely an incident; that his instructions were to get as direct a line as he could from Buffalo to Troy for connection between the International Bridge and Lakes and the Hudson river for the purpose of serving the through traffic, anything that might come from the West by the Grand Trunk for connection in the East with the Boston and Maine or with the waterway of the Hudson river.

2. The line does not reach the important cities of Schenectady and Syracuse.

3. It passes at a distance of from two to four miles from Rochester, as is variously stated in the evidence, connecting with that city both for freight and passenger business only by a spur. There are but sixty-two proposed stations upon the route, of which the following are in cities: Buffalo, Tonawanda, Rochester, Oneida, Utica, Watervliet, and Troy. Between Buffalo and Rochester it does not pass through any village of sufficient size and importance to be incorporated. Between Rochester and Oneida there will be stations in but two incorporated villages. Between Oneida and Utica it has a station at one incorporated village of about 700 inhabitants.

4. In our former opinion we stated the population and location of the various villages and hamlets near which the proposed road passes in the following language:

The number of such villages and hamlets by this tabulation is 85, and their estimated population may be classified as follows:

2000 and upward	1
1000 and upward to 2000.....	1
500 to 1000.....	8
400 to 500.....	3
300 to 400.....	9
200 to 300.....	7
100 to 200.....	20
Under 100	36

Total 85

The average estimated population is about 190.

The distance of these places from the proposed line of the road is roughly as follows:

On the line	14
Less than 1 mile away from line.....	28
Over 1 mile and less than 2 miles.....	29
More than 2 miles.....	14

Total 85

The distance of these same places, respectively, from the nearest freight house on the New York Central system is roughly as follows:

On line	5
Less than 1 mile	1
1 mile and upward but less than 2 miles.....	9
2 miles and upward but less than 3 miles.....	7

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3 miles and upward but less than 4 miles.....	12
4 miles and upward but less than 5 miles.....	9
5 miles and upward but less than 6 miles.....	15
6 miles and upward but less than 7 miles.....	10
7 miles and over	16
Total	84

The attention of the applicant was directly called to this statement upon the rehearing and it in no manner questioned the correctness thereof, and it will therefore be assumed that it accurately states the situation.

5. The country through which the line passes is in general a good farming region, well populated, and in the main well cultivated and productive. Naturally but few industries, and those small, are situated along the line outside of the cities.

6. Reference to the map shows that the proposed road parallels the line of the New York Central its entire distance, being situate a distance of some five to fifteen miles from the main line of the Central, and crossing it near Albany, at Utica, Oneida, and crossing various branches at other points. West of Oneida it is located between the main line of the Central and the line of the R., W. & O. The tract of country from which it can draw local business is, therefore, narrow and exceedingly limited.

7. The general character of the road is perhaps best disclosed by the applicant's own estimate of the source of its earnings. In its brief it admits that the road must earn, gross, \$12,142,850. It then continues as follows:

The next practical question is. Where is the business to be secured that is required to earn \$12,142,850?

We estimate that we shall receive from passenger receipts from the town and rural population the sum of \$270,000, or \$1405 per mile, or 65 cents per capita per annum of the population. This is equal to \$700 per mile of double-track road.

We estimate that we will handle of local freight 400,000 tons agricultural outgoing freight, and 100,000 tons of incoming freight, and 220,000 tons manufactured products, making a total of 720,000 tons.

Local freight average haul of 150 miles at one cent per ton-mile. A total that we will receive of \$1,080,000, making a total receipt from the local territory of freight and passengers of \$1,350,000. This will leave to be earned from the carriage of through freight \$10,792,650.

These figures demonstrate that the applicant does not anticipate getting more than practically about one-tenth of its revenue from the local business within the State of New York. Whether these estimates are correct or incorrect is not material at this time. They are to be regarded as the applicant's concession of the correctness of the view entertained by the Commission regarding the uses to which the proposed road will be put. A road 297 miles long, extending through the central part of the State of New York from east to west, which even its projectors admit will do local business to the amount of only \$1,350,000, must be judged as essentially a through route, designed to serve through purposes, and of but comparatively little consequence for the local traffic.

8. Another confirmation of this view is the plan or scheme of the proposed road with reference to the Buffalo business. This plan was not developed by the applicant at the first hearing and accordingly was not commented upon in the opinion. In the multiplicity of matters requiring attention its great importance was overlooked, and the Commission assumed that the road was of much greater consequence to Buffalo than the evidence at this time will warrant. Since Buffalo is one of the termini of the road, and the largest city upon the line, a particular statement of the situation in that city is indispensable.

THE BUFFALO SITUATION

The International Bridge crosses the Niagara river at Black Rock, at a point upward of five miles from the business center of the city. This bridge serves the Grand Trunk, Michigan Central, Wabash, and Pere Marquette railroads. It is owned by the International Bridge Company, which has

a small yard at the easterly end in Black Rock, extending easterly from the portal of the bridge only a few hundred feet. With this yard the Erie, New York Central, and the Delaware, Lackawanna and Western have connections, and also have yards of their own lying to the east and northeast of the yard of the Bridge company. At the point of connection with the bridge yards the Lackawanna is the westerly road; at the east lie the tracks and yard of the Central, and between the two the tracks and yard of the Erie. The main running • tracks of each railroad extend in a northerly direction practically parallel with each other for upward of a mile, when the Lackawanna, at a point just southerly of Ontario street, curves sharply to the right and crosses the main running track of the Falls line of the Central and passes around to the east, constituting the Lackawanna belt line around the city of Buffalo. The Lackawanna, a portion of its distance, is elevated upon a high embankment, while the Central follows the surface of the ground, the Lackawanna being elevated sufficiently to permit the Central to pass under its tracks at the crossing point. The land between these running tracks, beyond the tracks of the Erie which crosses the Central southerly from the Lackawanna crossing up to Ontario street, is owned by one or both of the two companies named.

The line of the proposed road does not extend to the International Bridge nor even to the yards of the bridge, but, as shown upon the map filed with the Commission, it crosses the line of the New York Central some distance north of the point where the Lackawanna crosses the Central, then passes under the Lackawanna just southerly of Ontario street and occupies the strip of land owned by the railroads and now used for railroad purposes between the two running tracks of the Central and Lackawanna, and terminates at a connection with the Lackawanna yard and not with the yard of the International Bridge. These facts justify the following statements:

1. Owing to the yard situation it is not possible to have any passenger station upon the line of the proposed road until it

has passed northerly under the Lackawanna and reached substantially Ontario street, a distance of more than eight thousand feet from the International Bridge.

2. There does not appear to be any possibility for a freight house upon the line of the proposed road nearer than substantially Ontario street.

3. There is no provision for bringing passengers into Buffalo over the line of the road itself to any point nearer than the northerly terminus of the Lackawanna yards at Black Rock.

4. There is no possibility of delivering less than carload or package freight at any point in Buffalo upon its own line other than near Ontario street, north of Black Rock.

5. The proposed road would have no direct connection with any existing elevator or with any existing industrial plant in the city of Buffalo, with the possible exception of two or three such plants at Black Rock, lying northerly of the crossing of the Lackawanna.

6. It proposes to have its water terminal on the Niagara river, at a point some three miles or upward north of Black Rock, in the vicinity of the Wickwire steel plant, this terminal to be connected with the main line by a spur diverging from it between Black Rock and Tonawanda. So far as it would handle lake freight directly, the water terminals and elevators necessary therefor have yet to be planned and built.

7. One of the points which has been most strenuously urged upon our attention is the service which the proposed road would render in relieving the congestion in the existing elevators in Buffalo during the lake season. It is claimed that the existing roads are now and have been for a long time unable to care properly for the lake traffic, both that received at the docks and at the elevators. The proposed road can not by means of its own line take any of such traffic. In order to handle any of it, transfer would have to be made

from the elevators and docks over the tracks of either the Central, Erie, or Lackawanna. The dilemma produced by this situation is a very curious one. It is urged upon us that the three roads named, though perhaps more especially the Central, are unable to handle the lake business properly by reason of their lack of facilities within the city of Buffalo, and yet the relief which is proposed is to continue the handling of all the lake freight with these identical facilities. A most vigorous effort has been made, supposedly in the interest of the Buffalo elevators, to induce the Commission to consent to the construction of this road for the reason that it would aid the elevators to obtain more business by affording greater facilities for taking the grain out of them. Just how a road with a water terminal and elevators of its own three miles north of Black Rock, and its nearest approach to the existing elevators being at the northerly end of the Lackawanna yards at Black Rock, would give such aid no one has told us.

8. No passenger traffic could be taken into Buffalo to any existing station except by using the tracks of either the Central, Erie, or Lackawanna. If the tracks of the Erie and Lackawanna were used, a detour around the entire city would be required. A connection could be made with the Falls line of the Central so as to reach the Central station over that line. Whether the Central would give trackage rights to the proposed road for this purpose scarcely requires discussion.

9. The road proposes to connect with the lines coming from the west and crossing the International Bridge. These are the Michigan Central, Grand Trunk, Wabash, and Pere Marquette. All business for these lines at this point would have to be moved over the International Bridge. No evidence has been given in this case showing directly the condition of business upon that bridge, but the Commission has official information of the situation there which it can not disregard or overlook. That bridge is a single-track bridge with two

draws therein, one over the main channel of the Niagara river and one over the ship canal. Its daily maximum capacity at the present time for cars both ways is about 1500, of which those now handled substantially 200 are passenger cars and 1300 freight cars. The bridge during the year 1910 was worked to its full capacity and no great accession of business can be handled over it without additional tracks, which can not be constructed west of Squaw island without reconstructing the bridge. That without such reconstruction additional traffic of any substantial amount from the west coming upon the lines named must go to Suspension Bridge.

The importance of this Buffalo situation was not overlooked by the Commission at the hearing, nor was it unknown to the applicant. At the hearing on May 4, 1910, after considerable preliminary discussion the following statement was made to counsel for the applicant:

Then we must assume, so there will be no misapprehension about it, that in the plan of this road as submitted to us there is absolutely no provision for taking care of any passenger traffic in and out of Buffalo.

Also,

That there is no provision to handle any less than carload freight in and out of Buffalo except such as will be tributary to the Black Rock station.

To this, part of the response by counsel for applicant was,

And so we will present a plan, I think, if that is the situation, of a passenger and freight station for the city of Buffalo at a later time. We are not prepared here now; we thought we ought to leave it just this way.

To this the Commission replied:

You are seeking for a certificate of public convenience and a necessity. Now a part of the convenience is to serve the people of Buffalo. That is the largest city on your road, by far, and where you expect to get a large amount of business. When you present to us the plan and your expense of construction that is based upon the proposition that you have absolutely no accommodation for handling traffic, the passenger traffic in and out of the city of Buffalo, and you have nothing to take care of any less than carload freight except as will be tributary to

the Black Rock freight house — why, you see, you show at once by leaving it that way that you are not serving the convenience of the city of Buffalo to any great extent. I do not rule anything; I am simply stating the unquestionable condition of the evidence at this time, so you must not make any mistake about it, make any oversight.

To this the reply was made:

Well, we will present comprehensive plans, then, for passenger and freight in the city of Buffalo.

Although the case continued for months after the attention of the applicant was thus sharply called to the condition of affairs in Buffalo, no plan was submitted pursuant to the suggestion of the Commission and promise of counsel. The applicant, therefore, deliberately chose to leave the case for decision upon the understanding that the evidence showed no way of handling passenger traffic or less than carload freight in Buffalo except as stated. There is certainly no way shown by the applicant for handling carload freight in that city except by the use of the lines and facilities of other roads, barring of course the delivery of the same to connecting carriers at the yard of the International Bridge.

We therefore proceed to a discussion of the other questions in the case in the light of the undisputed fact that the purpose of the road is chiefly and essentially to handle through freight originating west of Buffalo and east of Troy, across the State of New York. It would of course serve all the local or intrastate traffic, both passenger and freight, which it could attract, but concededly that would, from the nature of the situation, be but a small fraction of the business which must be done to justify the construction of the road. No adequate provision is indicated as even possible for taking care of passenger and less than carload freight traffic originating in or destined for Buffalo.

COST OF THE PROPOSED ROAD

It is undisputed that a determination as to the cost of the proposed road is of great materiality in this case. The reasons for this are too obvious to require discussion.

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Upon the former hearing the Commission found that such cost would be at least the sum of \$100,000,000. The applicant's own estimate was \$85,559,018. Upon this hearing it has adhered to that estimate, while the estimate presented by the objectors is the sum of \$117,246,551, a difference of \$31,687,533 between the two estimates.

The following are copies of the two estimates:

BUFFALO, ROCHESTER AND EASTERN RAILROAD ESTIMATE OF COST OF CONSTRUCTION					
Item	Quantity	Unit	Price	Amount	Totals
Excavation, rock.....	5,299,800	c. y....	\$1 25	\$6,624,750	
Excavation, other material.....	9,790,700	c. y....	30	2,937,210	
Excavation, borrow.....	3,382,800	c. y....	75	2,537,100	
Excavation borrow.....	300,000	c. y....	60	180,000	
Excavation, borrow.....	2,567,500	c. y....	30	770,250	
Excavation, overhaul.....	120,500,000	c. y....	01	1,205,000	
Excavation, overhaul.....	892,923,000	c. y....	005	4,464,615	
					\$18,718,925
Clearing.....	1,500	acres...	50 00	\$75,000	
Grubbing.....	1,000	acres...	200 00	200,000	
					275,000
Culverts, c.i. pipe.....	8,437	l. f.....	10 00	\$84,370	
Culverts and drain, vit. pipe.....	24,000	l. f.....	1 00	24,000	
Culverts, masonry for pipe ends.....	990	c. y....	10 00	9,900	
Culverts, boxes and arches.....	149,763	c. y....	10 00	1,497,630	
					1,615,900
Bridges, masonry.....	668,564	c. y....	9 00	\$6,017,076	
Bridges, 104 pile and timber foundations.....				216,000	
Bridges, steel.....	172,143,500	lbs.....	05	8,607,175	
					14,840,251
Retaining walls, masonry.....	110,000	c. y....	8 00	\$880,000	
Pile and timber foundations.....				50,000	
					930,000
Tunnels.....	1,830	l. f.....	150 00	\$274,500	
					274,500
Fencing.....	190,080	rods...	1 00	\$190,080	
Cattle-guards.....	140	set.....	25 00	3,700	
					193,780
Track material, rail 90 lbs.....	84,010	tons...	31 00	\$2,604,310	
Track material, joints complete.....	213,840	No....	2 00	427,680	
Track material, spikes.....	3,584,196	lbs.....	025	89,605	
Track material, ties.....	1,568,160	No....	68	1,066,350	
					4,187,945
Track laying.....	594	miles...	600 00	\$356,400	
Track ballasting.....	594	miles...	3,000 00	1,782,000	
					2,138,400
Telegraph line.....	300	miles...	150 00	\$45,000	
					45,000

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BUFFALO, ROCHESTER AND EASTERN RAILROAD ESTIMATE OF COST OF CONSTRUCTION (concluded)

Item	Quantity	Unit	Price	Amount	Total
Stations, yards, and terminals:					
Principal stations.....	6	No.....	\$40,000 00	\$240,000	
Minor stations.....	56	No.....	3,000 00	168,000	
Water stations.....	15	No.....	6,000 00	90,000	
Engine houses.....	6	20-stall.	2,000 00	240,000	
Fifty miles yard and terminal tracks.....				270,000	
					<hr/> \$1,008,000
Section houses, including equipment...	50	No....	325 00	\$16,250	
					<hr/> 16,250
Right of way.....	5,000	acres...	400 00	\$2,000,000	
					<hr/> 2,000,000
Total.....					<hr/> \$46,243,951
Contingencies, 10 per cent.....					<hr/> 4,624,395
					<hr/> \$50,868,346
Engineering, 5 per cent.....					<hr/> 2,543,417
Administration, legal, and general office expenses during construction.....					<hr/> 750,000
					<hr/> \$54,161,763
Equipment.....					<hr/> 10,000,000
Interest two years at 5 per cent.....					<hr/> 8,554,902
Organization, financing, and contingent expense at 15 per cent.....					<hr/> 12,842,353
					<hr/> \$85,559,018

NEW YORK CENTRAL'S ESTIMATE OF COST OF CONSTRUCTION

Item	Unit	Quantity	Price	Amount
Land, farm.....	acres.....	3,970		\$998,500
Land, village property.....	acres.....	824		1,295,000
Land, special property.....	acres.....	1,020		2,884,000
Land, city property.....	a. f.....	3,604,000		4,590,000
Clearing and grubbing.....	acres.....	1,000	\$100 00	100,000
Grading, unclassified.....	c. y.....	39,110,000		21 080,200
Grading, in water.....	c. y.....	64,700	2 00	129,400
Grading, rock.....	c. y.....	221,000		231,400
Tunnels.....	l. f.....	1,000	350 00	350,000
Grading highways.....	c. y.....	3,360,000		1,798,000
Damages, highways.....				1 190,000
Concrete (inc. cattle-passes).....	c. y.....	607,625		5,060,985
Piling, furnished and driven.....	l. f.....	584,100	50	292,050
Steel superstructures:				
I-beams.....	tons.....	1,200		75,540
Girders.....	tons.....	57,090		4,877,600
Viaducts.....	tons.....	7,200		663,700
Trusses.....	tons.....	43,865		4,052,850
Drawbridge machinery.....				25,000
Decks, double track.....	l. f.....	37,105	8 00	296,840
C.i. pipe.....	tons.....	8,724		488,860
V.t. pipe, 6-in.....	l. f.....	39,700	80	31,760
V.t. pipe, 10-in.....	l. f.....	21,800	1 20	26,160
V.t. pipe, 16-in.....	l. f.....	13,900	1 80	25,020
Floor for highway bridges.....	a. f.....	847,000	30	254,100

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NEW YORK CENTRAL'S ESTIMATE OF COST OF CONSTRUCTION (continued)

Item	Unit	Quantity	Price	Amount
Track, main 90 lb.....	l. f.....	3,189,300	\$2 10	\$6,697,530
Track, sidings and yards.....	l. f.....	1,456,000	1 50	2,184,000
Crossovers.....	No.....	150	500 00	75,000
Handcars and tools.....	No. sets...	87	300 00	26,100
Fences.....	rods.....	195,449	1 00	195,449
Snow-fences.....	rods.....	40,366	2 00	80,730
Highway grade crossings.....	No.....	57	100 00	5,702
Farm grade crossings.....	No.....	306	20 00	6,120
Cattle-guards at same.....	No.....	716	6 00	4,295
Signs.....	.....	.....	.....	6,000
Engine houses and all equipment...	stalls.....	125	8,000 00	1,000,000
Minor engine facilities, exclusive of water supply.....	.....	.....	.....	51,100
Water supply.....	.....	.....	.....	117,600
Water tanks.....	gals.....	1,625,000	05	81,250
Water columns.....	No.....	72	500 00	36,000
Pass. stations, 1st cl.....	No.....	6	.....	311,400
Pass. stations, 2nd cl.....	No.....	19	.....	42,000
Pass. stations, 3rd cl.....	No.....	29	.....	14,500
Combination stations.....	No.....	21	2,000 00	42,000
Freight houses.....	s. f.....	239,000	2 00	478,000
Yard offices and minor buildings...	s. f.....	44,318	2 00	88,636
Track scales.....	No.....	11	5,000 00	55,000
Transfer houses and platforms.....	No.....	4	.....	35,000
Paving in team yards.....	s. y.....	68,000	2 00	136,000
Local car repair facilities.....	No.....	7	.....	45,000
Stock yards (local).....	No.....	40	350 00	14,000
Stock yards (general).....	No.....	1	.....	100,000
Pillar and gantry cranes.....	No.....	14	2,000 00	28,000
Brown hoists.....	No.....	2	50 000 00	100,000
Telegraph lines.....	miles.....	309.3	400 00	123,720
Signals.....	miles block	302.2	4,000 00	1,200,800
Interlocking.....	No. of levers	670	700 00	469,000
Docks and bulkheads.....	l. f.....	11,200	70 00	784,000
Dredging.....	c. y.....	461,300	50	230,650
Grain elevators.....	bu.....	4,000,000	50	2,000,000
Buildings for general offices.....	.....	.....	.....	400,000
General repair shops.....	.....	.....	.....	1,150,000
Construction cost, exclusive of right of way and land damages.....				\$58,383,843
Contingencies, 10 per cent.....				5,838,384
				<hr/> \$64,222,232
Right of way and land damages.....				10,957,500
				<hr/> \$75,179,732
Engineering and supervision, 5 per cent.....				3,758,987
Organization and legal expenses, 1 per cent.....				751,797
				<hr/> \$79,690,516
Interest during construction, 10 per cent (5 per cent per annum).....				7,969,052
				<hr/> \$87,659,568

NEW YORK CENTRAL'S ESTIMATE OF COST OF CONSTRUCTION (concluded)

Item	Unit	Quantity	Price	Amount
Equipment:				
Locomotives.....		300	\$16,000 00	\$4,800,000
Freight cars.....		8,000	700 00	5,600,000
Passenger cars.....		100	9,000 00	900,000
Wrecking outfits.....		5	30,000 00	150,000
Snow equipments.....				50,000
Work equipments.....				50,000
Cont. on equipments.....				450,000
				<hr/> \$12,000,000
Discount assumed, 15 per cent.....				17,586,983
				<hr/>
Total investment.....				\$117,246,551

These estimates of the respective parties have been subjected to careful and painstaking examination. All of the evidence relating to them has been examined with care and an analysis has been made of the matters in difference, whether in quantity or unit prices. After such analysis and examination the Commission adheres to its former conclusion that the cost of the road would be not less than \$100,000,000.

It is unnecessary at this time to enter into a discussion of the details of these estimates. In its former opinion the Commission expressly stated: "We believe that if the cost were this latter sum (\$85,000,000) every conclusion which follows from the estimate of \$100,000,000 would be equally true"; and to this view the Commission still holds. In the making of the estimates there is room for wide differences of opinion in theory, but upon many points where there are differences in the estimates there can be no reasonable chance for a difference of opinion as to the necessities of the case. One example of this will illustrate many cases. On page 43 of the applicant's brief, Vol. 1, No. 2, is to be found the following: "Two water terminals, not included in Buffalo, Rochester and Eastern estimate as such terminals, would probably be built and operated by separate terminal companies. Therefore item of \$4,000,000 in New York Central estimate should not be included."

This matter of \$4,000,000 refers to the estimate of the New York Central upon the former hearing. The two terminals referred to are those at Lake Erie and the Hudson river. They are both indispensable, according to the applicant's theory, to a proper operation of its road and its successful working. The Commission is entirely unable to comprehend why they should be eliminated from the cost of the road inasmuch as they will be an essential part thereof. Without the water terminal at Buffalo the lake business would be a negligible quantity.

The second determination of material fact is, therefore, that the proposed cost will be not less than \$100,000,000. This would make an average cost per mile of \$336,700. An annual return of 5 per cent upon the capital invested would require a net income of \$5,000,000, which would necessitate a net income of \$16,835 per mile. With an assumed operating ratio of 65 per cent, this would require a gross operating revenue of \$14,285,741, without providing for taxes and depreciation beyond that taken care of in maintenance charges.

ADEQUACY OF THE EXISTING THROUGH FACILITIES

In reaching its determination upon the former hearing the Commission voted upon the following specific question: "Are existing facilities adequate for the existing through traffic?" Upon this each and every Commissioner voted "Yes". This was in February, 1909, nearly two and one-half years since. The conclusion thus reached was based upon the evidence in the case and upon the knowledge of the Commission of the extent of the facilities and the character of the service afforded by the various through lines leading eastward from Buffalo. Since taking that vote the Commission has had the benefit of its added experience of nearly two and one-half years in closely observing traffic conditions.

The applicant upon this hearing has produced a large number of witnesses whose evidence relates to the service afforded

by the New York Central. It is a material circumstance that this new evidence relates to shipments made from within the State of New York either to points within the State or to New England points. It will therefore be considered in another connection, namely, in the discussion of the facilities for the local traffic. So far as the through traffic is concerned the condition of the new evidence is as follows:

a. The applicant has not shown that at any time since the former decision either the New York Central or any other road leading east from Buffalo has refused to accept freight from western connections, or failed to transport the same, when accepted, without delay to the point of consignment.

b. It has not shown any delays in handling any eastbound through freight coming from the west either by rail or water and delivered to existing rail lines at Buffalo, since 1907.

c. It has not shown any congestion in the elevators at Buffalo existing since 1907, or that any grain has been held in those elevators, or any elevators, because of the inability to forward the same by rail eastward, except one item of evidence of about 500 cars — in which it was alleged there was some delay in their being furnished — out of a total of 5000, but with no specification of the road or roads which were chargeable with the delay.

d. It has not shown that either the Central or the Delaware and Hudson has failed to accept any of the traffic offered them, or either of them, by the Boston and Maine, and promptly transport the same to destination.

e. It has not shown that there has been any delay in promptly forwarding freight by any New York line offered by the Boston and Albany or by the New York, New Haven and Hartford.

To sum up the matter, the case is practically barren of evidence showing delays in the handling of through freight, meaning thereby freight coming from the west of Buffalo or east of Albany and Troy.

The Commission has no knowledge, official or otherwise, of any delays or lack of facilities on the part of the existing roads in handling such through freight, since the year 1907. In addition to a lack of complaints, it has had several proceedings before it which necessarily involved inquiry into the matter, and such inquiries have failed to reveal delays in the handling of this class of business or lack of facilities for that purpose. It has also taken occasion during the past three years to have observations made by its inspectors.

One of the serious complaints which met this Commission upon its taking office, and to which it referred in its former opinion in this case, was that the railroads did not serve adequately the grain traffic from the Lakes passing through the elevators at Buffalo. Such traffic is usually termed ex-lake traffic and will be hereinafter referred to by that term. The Commission has had that situation under observation now for four years. During the greater part of the time it has had a traffic inspector stationed at Buffalo making constant reports of the situation. It did not, however, have detailed daily reports upon the car supply and car shipments until the latter part of October, 1910. Commencing with the 21st of October, 1910, it has had daily reports from its inspector at Buffalo, showing the number of cars on hand ready to receive ex-lake grain held by each road handling such traffic, in the morning of the day, and the number of cars actually loaded and shipped out during the same day. These reports have been tabulated from October 21, 1910, to June 18, 1911. The detailed tables showing the condition each day it is unnecessary to insert at this place; a summary of the same by months, representing the situation with all substantial correctness during the entire period, will suffice.

The following table shows under the name of each road the average number of cars ready from day to day, in the morning of the day, the number of cars actually loaded and shipped out during the day, and the percentage of the total

number of cars actually loaded and shipped to the cars ready to be loaded and shipped.

	CENTRAL			D., L. & W.			LEHIGH			ERIE		
	Daily average of cars ready	Loaded out	Per cent	Daily average of cars ready	Loaded out	Per cent	Daily average of cars ready	Loaded out	Per cent	Daily average of cars ready	Loaded out	Per cent
Oct ¹	367	162	44	506	128	25	346	66	19	81	31	38
Nov	428	110	26	359	62	17	299	31	10	148	23	16
Dec	367	47	13	289	22	8	171	8	5	73	8	11
Jan	166	27	16	364	16	4	120	6	5	78	3	5
Feb	153	28	18	575	25	4	49	10	20	54	3	5
Mch	133	27	20	777	23	3	67	12	18	45	2	4
Apl	130	45	35	801	33	4	113	9	8	112	13	12
May	281	131	47	351	99	26	182	49	27	154	51	33
Jun ²	198	79	40	434	57	13	102	31	30	158	40	25

¹ Beginning October 21, 1910.

² Ending June 18, 1911.

This table shows a total of 30,862 cars of ex-lake grain loaded out by the four roads named during the stated period. No comment need be made upon it.

In the disposition of this case the Commission does not deem it essential to go back to the facilities afforded or the service rendered in 1907, or in the years immediately preceding. The service rendered in that and preceding years was fully discussed in the former opinion, and in some respects severely condemned. Three and one-half years have elapsed since that time, and the railroads have been afforded opportunity to make such additions and betterments to their facilities and such improvements to their service as the exigencies of the case demanded. In the year 1911 they must be judged by the facilities which they then possess and by the service which they then render. The possibilities of the future must be judged by the extent of the facilities which they now have and not by those which they had four years ago. It is unquestioned that some of the roads, at least, have made large expenditures and that the effect of such expenditures upon the service has been noticeable. It is not for a

moment to be assumed that the service can not be improved. There is no railroad whose service has reached the point of perfection. It is not to be assumed that facilities will not be needed in the future in addition to those which are now possessed. As to those facilities, the question will be whether they can be supplied as the occasion for them arises and whether the railroad companies will supply them to the extent the public service requires.

It is to be observed that upon the applicant's own showing at least nine-tenths of all the service which it proposes to perform is in the handling of this through freight, meaning hereby, as before, freight coming from west of Buffalo by lake or rail, and freight coming from east of Albany and Troy by rail.

It makes no showing whatever that the facilities for the handling of this freight at the present time are inadequate or defective. It does make numerous assertions for which we find no warrant in the evidence. Thus, in its brief it says: "We regard, however, as an absolute demonstration and proof that there is now more than 4,500,000 tons of freight to be moved by rail from the Niagara Frontier in excess of what is required to maintain all existing lines." We are unable to find any proof warranting this statement. Again, upon this point it asserts in another place: "Sixty million tons are handled through the Buffalo gateway, not including the canal shipments of the corresponding year of 2,540,907 tons." This remark relates to the year 1906, and we know of no evidence supporting its correctness. The four great trunk lines carrying freight eastward from Buffalo are the Central, Lackawanna, Erie, and Lehigh. These four lines reported to this Commission that for the year ended June 30, 1909, the total number of tons carried upon their entire systems, aggregating 7884 miles, was 116,807,739. That over half of this was handled through the Buffalo gateway is the claim of the applicant. We are unable to find any facts in the record and none within our official knowledge which justify any such claim.

An enormous volume of figures has been laid before us, compiled from various sources, as to the amount of traffic handled at this or that point. It has received attentive consideration, but the one fact which is paramount and overshadows all others is that at the present time and for three years past the railroads have been handling all the through freight satisfactorily and without complaint, so far as this Commission is advised by the record in this case or in any other manner.

We are therefore constrained, upon a consideration of all the evidence in the case and of all the facts within our knowledge, to find as the third matter of fact that the existing facilities for handling that class of business, from which the applicant proposes to obtain nine-tenths of all its revenues, are adequate, and that the business has been and is being handled satisfactorily. If we are mistaken in this conclusion it is not because of lack of effort to ascertain the real fact.

**HANDLING OF LOCAL TRAFFIC BY THE NEW YORK CENTRAL
SINCE 1907**

We now come to the point to which the great bulk of the new evidence adduced by the applicant upon this rehearing was addressed. One of the findings of fact upon which the former decision in this case was based was that the existing railroad facilities within the territory reached by the proposed road were unquestionably adequate for existing business and that the existing tracks were adequate for a very large increase in future traffic, and that whatever terminals, yards, sidings, engine houses, locomotives, and other facilities would be required to properly provide for future increase in traffic, were either then being provided or could be readily supplied from time to time as occasion requires them.

These findings of fact have been seriously challenged by the applicant, and its method of demonstrating the error into which the Commission is alleged to have fallen has been, not by showing the extent of the facilities provided, but by attempting to show that whatever they may be they have been

inadequate to take care of the business offered the Central with proper dispatch and efficiency. It has called some seventy-four witnesses who have given evidence of greater or less importance regarding alleged undue and unreasonable delays in the transportation of freight, and some thirty-five witnesses have given evidence claimed to show that there have been delays in furnishing cars when required for carload shipments. Failure to supply needed equipment when required and undue and unreasonable delays to freight in transit are of course very cogent and powerful evidence tending to show lack of facilities, and it makes no difference in fact to the shipper or consignee whether his difficulties arise from lack of facilities or lack of proper management, the result to him is the same in either case; and while delays and poor service may arise from either cause it is not particularly essential to him to inquire from which.

In giving fair and reasonable consideration to this evidence it is essential first to take into consideration the volume of business transacted by the Central. In the operation of any railroad there will always be delays, errors, omissions, and accidents arising from unforeseen and unpreventable causes so that the service can never be up to the highest possible standard of theoretical efficiency. The percentage of proven delays to the entire amount of traffic is certainly a matter which can not be overlooked. It has been shown that the Central receives about 30,000 consignments daily, and handles from 18,000 to 20,000 cars a day. In the handling of this vast volume of business there will be a certain percentage of delays unavoidable, arising from what is commonly known as the failure of the human element: that is to say, the errors of individuals in failing to discharge their duties promptly and accurately at the precise moment needed in order to insure the highest theoretical efficiency. There will also be inevitable accidents. There will be bad weather conditions, especially in the winter. There will be a variety of other matters occasioning delays which are too well known to require further enumeration.

It is impracticable, and would be useless if it were practicable, to review each and every item of evidence presented by the various witnesses regarding delays in transit. A careful examination has been made of each case and the answer made thereto by the Central, either by general or specific evidence. An analysis and classification of this evidence throw the failures and delays in transit mentioned by the various witnesses into certain general divisions:

1. Failures and delays too trivial in their nature to base upon them any charge of defective service.

The evidence of a very considerable proportion of the witnesses sworn by the applicant upon failures and delays in transit falls under this head. The witnesses were evidently unfamiliar with the length of time required for the proper handling of their business, were inaccurate in detail, and uncertain as to particulars.

2. Failures and delays which are unavoidable in the operation of any road and which will inevitably occur from time to time under any management and with any amount of facilities.

Some of the delays complained of by applicant's witnesses have been shown by specific evidence adduced by the objectors to belong to this class.

3. Alleged failures and delays which upon examination are not found to be well based and in which the service was in fact adequate.

Many of the cases alleged by the witnesses constituted service which in the judgment of this Commission was adequate and sufficient.

4. Failures and delays in interstate commerce in which it is impossible from applicant's evidence to say whether the delay occurred upon the line of the Central or upon the line of some connecting carrier outside of the State.

There was some evidence given showing delays in shipments into New England, the deliveries being made at points on the New Haven and on the Rutland. In none of these

cases where a real delay was shown was it possible to ascertain from the evidence whether the delay was that of the Central or other carrier accepting the consignment in this State, or of the New England road to which it was transferred before reaching the point of consignment. This Commission has had occasion to trace many such shipments, and in a great majority of cases where it has caused the delay to be traced out it has found it to be upon the connecting road and not upon the Central. This does not show that any of the delays proved in this case were of this character, but it does demonstrate conclusively that it is not just to attribute the delay to the initial carrier simply because there is a delay. It is, however, an ineradicable tendency of human nature to attribute the delay, where the cause is unknown, to the carrier to which the consignment was delivered.

5. Failures and delays arising from causes which may be removed by the action of this Commission.

Some delays were shown, occasion for which may be classified under this head, and in all of these instances it is believed that the cause has been removed.

6. Failures and delays which occurred before the year 1908.

Some of the evidence related to such delays, but we hold concerning those delays, as with reference to delays in through shipments, that the situation must be judged as it exists at the present time and not as it existed before strenuous efforts had been made both by the carriers and this Commission to produce a better state of affairs.

7. Delays concerning which there is a serious dispute as to the facts.

A considerable volume of evidence was given by the applicant concerning the alleged delays in transit, the proof concerning which was derived from what is known as the postal card system. In this system the consignor forwards to the consignee a postal card giving the date of delivery by him to the carrier, and requests from the consignee a return of the

card stating the date of the receipt of the consignment. The difference between the two dates is taken as the time occupied by the carrier in performing its service, and the reasonableness and adequacy of service is judged by this time. In other cases the testimony was based upon the dates of bills of lading and time of the receipt of the goods by the consignee. In a considerable number of instances the applicant, by this class of evidence, made a *prima facie* case of bad service against the Central. To meet this testimony that company introduced in evidence a transcript of its records in a large number of shipments, showing the date of delivery of consignment to it, the date the consignment reached the point of delivery to consignee, the date notice was given to consignee of arrival, and the date consignee accepted delivery from the carrier. The discrepancies between the two classes of evidence are very great, and so great as to cast a very large degree of discredit upon one or the other. It will be profitable to consider these discrepancies somewhat in detail.

A witness from the city of Buffalo gave evidence concerning alleged delays in the handling of cars by the Central between East Buffalo and Black Rock, the Central receiving the cars from other carriers at East Buffalo and switching them to the consignees at Black Rock. The evidence related to the delivery of 34 different cars. According to the evidence of the witness there was an aggregate of 94 days required to deliver these cars, an average of 2.8 days. The records of the Central regarding the movement of these identical cars, placed in evidence, showed a total of 47 days occupied in delivery, or an average of 1.4 days. In one case the witness claimed the car was in the possession of the Central for four days, while the evidence of the Central showed it was but one day. In another case the witness claimed the car to have been in possession of the Central three days, while the evidence of the Central showed such car in its possession but one day.

The evidence of the sole witness from the city of Utica affords another cogent illustration of this situation. This

witness gave evidence of a number of shipments from Utica to different points, and the following table shows in the first column the place to which consignment was made, in the second column the time claimed by the witness to have been occupied in transit, in the third column the time claimed by the Central, as shown by its records, to have been the actual time:

<i>Destination</i>	<i>Witness' time</i>	<i>Central's time</i>
Amsterdam.....	6 days.....	2 days
Fonda.....	4 days.....	same day
Little Falls	3 days.....	1 day
Rome.....	5 days.....	1 day
Little Falls	3 days.....	same day
Rochester.....	3 days.....	3 days
Amsterdam.....	3 days.....	1 day
Cohoes.....	5 days.....	1 day
Cohoes.....	4 days.....	1 day
Cohoes.....	6 days.....	2 days
Cohoes.....	3 days.....	1 day
Cohoes.....	4 days.....	1 day
Amsterdam.....	3 days.....	1 day
Amsterdam.....	4 days.....	1 day
Amsterdam.....	4 days.....	1 day
Syracuse.....	3 days.....	1 day
Fonda.....	3 days.....	same day

Several other illustrative cases demonstrated that evidence of this character can not be accepted at its full face value without careful inquiry into the facts. In the analysis made in these cases the figures will be placed in two columns: the first containing the claim of the witness as to the time occupied in transit, and the second the time shown by the official records of the Central:

	<i>Claimed</i>	<i>Answer</i>
Case 1:	11 days	7 days
	9 days	4 days
	5 days	4 days
Case 2:	30 days	4 days on Central. connecting line 14
	12 days	2 days on Central, connecting line 4 held for consignee 6

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	<i>Claimed</i>	<i>Answer</i>
Case 3:	13 days	2 days
	5 days	4 days: 1 holiday, 1 Sunday
	31 days	5 days, including delivery
	5 days	correct
	5 days	3 days
	5 days	4 days: Central 3, connecting line 1
	11 days	correct, car astray
	10 days	correct: Central 3, Boston and Maine 7
Case 4:	6 days	2 days
	5 days	1 day
	7 days	4 days
	9 days	2 days
	5 days	2 days
	10 days	6 days
	8 days	5 days
	6 days	2 days

Case 5: This relates to shipments from Rochester to a point 56 miles distant therefrom. Complaint that goods were invariably not less than 3 days in transit, some times longer. The records of the Central show all of the consignments from Rochester to this witness during the year 1909, being 29 in number: average time 1.2 days, including Sundays; no consignment in transit more than 1 day unless Sunday was included.

Case 6: This complaint related to the furnishing of cars. Witness claimed he had been delayed every time he asked for cars during the months of December, 1909, and January, 1910; had great difficulty in getting cars during these months. The exhibit of the Central taken from its records showed the total number of cars furnished witness during the time complained of was 68: cars furnished the day designated by witness 49, being 72.1 per cent of total number; cars furnished on the day following designated day, 10 in number, being 14.7 per cent; cars furnished second day after designated date, 5 in number, being 7.3 per cent; cars furnished third day, 4 in number, being 5.9 per cent; percentage of total furnished at date wanted and following day, 86.8 per cent.

Case 7: This was delivery of goods at a point 22 miles from Rochester. Complaint that shipments would not arrive for three and some times five days. Central gave evidence of all shipments to the witness from Rochester during the year 1909. Total number of shipments, 76: of this number 66 were delivered in one day, 8 in two days, 2 in three days; the consignee delayed taking delivery 7 days in one case, 6 days in two cases, 5 days in two cases, 4 days in five cases, and 3 days in seven cases.

The foregoing cases are not cited as being of any large importance in themselves but as showing the character of the evidence adduced upon both sides and the difficulties to be encountered in endeavoring to ascertain the real facts of the case.

In some cases, witnesses having a large number of shipments made during a year or other stated period of time, selected a few cases concerning which they complained, and gave no account of others, leaving the Commission to conclude that the great bulk of their shipments was satisfactory.

Upon a most careful review of the details of this class of evidence it is impossible for the Commission to say other than that in a very considerable number of the cases presented by the applicant as delays, no delay or inadequate service was shown; in others, the delay which did exist was owing to unpreventable causes in many cases. The weight of evidence is decidedly in favor of the Central, in many cases by reason of greater accuracy of detail and the use of written records; and the net result of the whole is that the evidence has failed to establish the point for which the applicant is contending.

In addition, in endeavoring to meet the specific claims of the applicant the Central has offered generally evidence concerning the manner in which it handles specific classes of service.

Evidence Offered by the Central as to the Character of Its Service:

A very large mass of exhibits was placed in evidence by the Central, showing its methods of handling freight, the number of trains dispatched by it during given periods, and the time actually occupied in the transmission of freight between given points. These exhibits run into scores, and comprise an amount of detail which it is impossible to compress satisfactorily into a succinct statement. An attempt will be made to summarize some of the more important matters.

1. Along the southerly shore of Lake Ontario, west of Oswego and east of Suspension Bridge, is a district served

by the Central which is largely devoted to the growing of fruit. It is commonly known as the fruit district. The demands for cars in this district during the fall of a successful fruit season are very great. The kinds of cars required are refrigerator and ventilated produce cars. Good service for this character of traffic naturally demands prompt furnishing of cars and quick deliveries. There are within this fruit district upon the lines of the Central some fifty-three stations. The records of all these stations have been examined and a transcript thereof placed in evidence, for the months of September and October, 1910. The following is a summary of the results shown by these statements:

September:

Total number of cars ordered..... 2518
 Furnished on day for which ordered..... 2387 being 94.80% of total
 Furnished next day after day ordered..... 126 being 5 % of total
 Furnished second day after day ordered... 5 being 0.2 % of total

October:

Total number of cars ordered..... 4155
 Furnished on day for which ordered..... 3982 being 95.84% of total
 Furnished next day after day ordered.... 148 being 3.56% of total
 Furnished second day after day ordered... 22 being 0.53% of total
 Furnished third day after day ordered.... 3 being 0.07% of total

The supplying of cars with reference to the cars ordered and the day for which wanted, in the county of Wayne, was as follows:

	<i>September</i>			<i>October</i>		
	<i>Day ordered</i>	<i>Next day</i>	<i>Second day</i>	<i>Day ordered</i>	<i>Next day</i>	<i>Second day</i>
Lakeside	31	1		59	3	
Ontario	34	2	1	94	7	2
Williamson	194			243	5	1
Sodus	58	2		95	13	
Wallington	2			16		2
Alton	4			5	1	
North Rose.....	28			56	3	
North Rose.....	28			20	7	
Red Creek.....	8			45	9	1

As to the promptness of delivery during the fruit season, the Central ran two fruit trains from Suspension Bridge to

Rochester, one by the Falls branch and the other over the R., W. & O., picking up cars on the way. The scheduled time of one train during the month of September, 1910, was 15 hours and 45 minutes; the average actual running time during this period was 14 hours and 33 minutes. Of the other, the scheduled time was 14 hours and 45 minutes; the average actual running time 11 hours and 32 minutes. These trains were consolidated at Rochester and thence ran to New York, leaving Rochester at 11 a. m. and scheduled to arrive at New York at 4.30 p. m. the following day, being a scheduled time of 29 hours and 30 minutes; the average actual running time during the month of September was 29 hours and 53 minutes.

Freight Trains, Their Scheduled and Actual Running Time:

As to the time taken by the Central in forwarding freight after it gets into its possession, a vast amount of documentary evidence has been submitted by it. A complete exhibit of the number of trains moving eastward from the Niagara Frontier has been made. The following tabulations show the average running time of all trains moving from this point for the month of July, 1910, in connection with their scheduled running time. It should be noted that no one has criticised the scheduled time as being too long. The tabulations show the trains from West Seneca which reach the Central at Depew by way of the Terminal Railway of Buffalo, Suspension Bridge, and Buffalo, giving in the first column the symbol by which the train is known, in the second column the destination, in the third column the starting time, in the fourth column the scheduled running time, and in the fifth column the average running time:

WEST SENECA				
Symbol	Destination	Starting time	Schedule time	Av. run. time
N.Y. 4.....	New York.....	6 a. m.	23 h.	24 h. 49 m.
N.Y. 6.....	New York.....	8 a. m.	21 h. 45 m.	22 h. 22 m.
B.A. 4.....	Albany.....	8:30 a. m.	19 h. 30 m.	19 h. 26 m.
B.A. 2.....	Albany to Boston.....	9:30 a. m.	15 h. 35 m.	14 h. 47 m.
W.S. 4.....	Weehawken.....	2 p. m.	42 h.	44 h. 50 m.
B.A. 6.....	West Albany.....	3 p. m.	19 h. 30 m.	19 h. 26 m.
B.A. 6.....	Albany to Boston.....	11:30 p. m.	14 h. 45 m.	14 h. 11 m.

SUSPENSION BRIDGE

Symbol	Destination	Starting time	Schedule time	Av. run. time
W.S. 2.....	Weehawken.....	3 a. m.	27 h.	26 h. 17 m.
N.Y. 2.....	New York.....	5:25 a. m.	24 h. 50 m.	25 h. 4 m.
B.A. 2.....	West Albany.....	9:30 a. m.	20 h.	20 h. 20 m.
B.A. 2.....	Albany to Boston.....	9:30 a. m.	15 h. 35 m.	14 h. 47 m.
S.R. 2.....	Rochester.....	6 a. m.	9 h.	10 h. 41 m.
S.D. 2.....	DeWitt.....	6:25 a. m.	13 h. 35 m.	13 h. 49 m.
S.D. 4.....	DeWitt.....	1:45 p. m.	10 h. 45 m.	12 h. 6 m.
S.F. 4.....	Lyons.....	7:45 p. m.	8 h. 15 m.	8 h. 53 m.
R.D. 2.....	Norwood.....	9:30 p. m.	24 h.	24 h. 4 m.

BUFFALO

Symbol	Destination	Starting time	Schedule time	Av. run. time
X.B. 2.....	Albany.....	1 a. m.	16 h. 30 m.	15 h. 12 m.
X.B. 2.....	Albany to Boston.....	3:30 p. m.	14 h. 5 m.	14 h. 10 m.
B.M. 2.....	Albany.....	3 a. m.	25 h. 30 m.	31 h. 1 m.
B.R. 4.....	Rochester.....	7 a. m.	8 h.	7 h. 26 m.
B.F. 2.....	Lyons.....	7:30 a. m.	8 h.	7 h. 30 m.
B.I. 2.....	Newark.....	7:45 a. m.	8 h. 30 m.	10 h. 16 m.
B.W. 2.....	Weehawken.....	8 a. m.	22 h. 30 m.	23 h. 35 m.
X.N. 2.....	New York.....	10:15 a. m.	24 h.	26 h. 11 m.
B.A. 8.....	Albany.....	11 a. m.	34 h.	32 h. 53 m.
B.A. 8.....	Albany to Boston.....	2 a. m.	16 h. 30 m.	17 h. 25 m.
B.J. 2.....	Canandaigua.....	5 p. m.	5 h. 15 m.	4 h. 27 m.
X.M. 4.....	New York.....	6 p. m.	24 h.	28 h. 5 m.
B.D. 2.....	DeWitt.....	8 p. m.	12 h.	12 h. 2 m.
B.F. 6.....	Rochester.....	10 p. m.	5 h.	4 h. 51 m.
B.D. 4.....	DeWitt.....	10 p. m.	12 h.	12 h. 12 m.
B.N. A.....	New York.....	11:30 p. m.	27 h. 30 m.	28 h. 44 m.

These tables show some twenty-seven trains leaving the Niagara Frontier daily, designed to accommodate freight. It is also shown that whenever any train is inadequate to handle the offerings, extra sections are put on and run under the same symbol. There is, so far as we can discover, no evidence of inadequacy of this service in handling the through freight at the present time. The running tracks are ample to take care of it, and a finding that the facilities offered for caring for this service are inadequate would be without evidence to sustain it.

Actual Running Time of Various Trains:

The Central has also placed in evidence proof of the actual running time of various trains upon its road for various periods, as follows:

- a. From Carroll Street, Buffalo, to Troy, from July 15 to July 31, August 15 to August 31, and September 15 to September 30, 1910.
- b. From Kent Street station, Rochester, to Troy during same periods.
- c. From Syracuse to Troy during the same periods.
- d. Of all the cars loaded by the Buffalo Fertilizer Company of Buffalo, N. Y., for points east during the months of February, March, and April, 1910, showing date delivered to the Central, destination, time of arrival at point of destination, time on New York Central, and time on connecting lines. This record embraces the movements of some 344 different cars to considerably over 100 local points, and many deliveries to the New York, Ontario and Western, Boston and Maine, and the Rutland.
- e. Record showing number of cars and average time from New York, Troy, Albany, Schenectady, Utica, Rome, Rochester, and Buffalo, to West Street station, Syracuse, for the periods July 6 to 23 inclusive, 1910, and September 17 to 30 inclusive, 1910, showing in detail the time occupied in transit by each car.
- f. Record of the same matters for the Townsend Street station, Syracuse.
- g. Record of merchandise house cars, showing the average transit time to Rochester from New York, Troy, Albany, Schenectady, Utica, Rome, Syracuse, and Buffalo for the period July 6 to 23, 1910.
- h. Same record for Rome for period July 6 to 22 inclusive, and September 17 to 30 inclusive, 1910.
- i. Same record for Utica from New York, Troy, Albany, Rochester, Syracuse, Buffalo, Rome, and Schenectady for the same periods.
- j. Same record for Schenectady.
- k. Same record for Albany.
- l. Same record for Troy.
- m. Same record for Rochester from November 2 to 20 inclusive, 1909.
- n. Same record for Syracuse, West Street.
- o. Same record for Syracuse, Townsend Street.
- p. Same record for Utica.
- q. Same record for Schenectady.
- r. Same record for Albany.
- s. Same record for Troy.

The foregoing records show the movement of each car in the periods covered, totaling during the entire period thousands of cars. The Central has also placed in evidence the time of movement of all the less than carload freight originating in Buffalo, Rochester, Lockport, Syracuse, and Utica designed for Boston, East Cambridge, Worcester, and East

Springfield, Mass., during the period from July 3 to 26, 1910, showing the average time on the road and average terminal time. Also a record of less than carload freight from the same stations to the same points in Massachusetts from November 8 to 20, 1910.

The character of these exhibits has been briefly indicated, as was the evidence adduced by the applicant alleging delays in transit, for the purpose of showing the enormous amount of evidence which has been placed before the Commission as to the character of the service rendered by the New York Central. That company has analyzed and reported movements of thousands of cars, and it would be impossible to obtain a better view of the actual results than has thus been given except by covering longer periods of time. The periods of time covered by these statements are claimed to have been selected without any particular reason, so far as the character of the service was concerned, and it is claimed that these periods of time are fair average periods. The applicant has not attempted in its brief or in the oral summing up of its counsel to criticise the results shown by these exhibits, nor has it produced any proof upon rebuttal tending to contradict them, and it must be held that these results sustain beyond question the contention of the Central that its service as a whole is adequate and efficient.

RECORD OF COMPLAINTS MADE TO THE COMMISSION

During the year 1910 there were received by this Commission sixty-one complaints in relation to alleged delays in the transportation of freight and in relation to the furnishing of cars for shipment of freight. Of these, twelve related to interstate commerce, which class of complaints is entertained by the Commission and investigation made, the same as in the case of complaints regarding local matters. Of the total number, twenty-four were against the New York Central: of which number eight were found to be unwarranted, while sixteen had merit. An analysis of these complaints against the New York Central, as well as of all received during the

year, fails to show any charge of general congestion or delay, or of any shortage of equipment, except in October and November there was a shortage of cars for the shipment of potatoes from points on the line of the Erie and some of its feeders.

During the period commencing January 1 and ending June 15, 1911, there were received by this Commission twenty complaints in relation to alleged delays in transportation and the furnishing of cars. Of these complaints, eleven were against the New York Central: six were found to have merit and five were unwarranted. No complaints have been received of chronic delays or of congestion at any point.

The experience of the Commission is such as to lead it to believe that if the railroads under its supervision were not fairly and adequately serving the public at the present time, it would have early and emphatic information of such failure.

After the most careful and comprehensive study which the Commission has been able to give to this enormous mass of evidence, treating the matter in its broadest aspect and making all allowances in every direction which good judgment would seem to require, it must hold, as it held upon the former decision, that the existing facilities are adequate for existing business; and it must hold in addition thereto that the service which has been given during the past three years, and is being given now, is of such a character as not to warrant the construction of another road for the purpose of affording additional facilities and relief from delays and inadequate service.

The Commission is thoroughly aware that the service at times upon the Central, as upon all other roads, does not reach the highest standard; it is aware that improvement is possible, but it believes that all proper and needful improvements can and will be made by the existing road, either by its voluntary action or by direction of this Commission. It can not be overlooked that the betterment of freight service is one of the purposes for which this Commission was created. This purpose it has served in great numbers of cases. Its

experience is such as to justify the belief that its authority and powers are adequate to relieve and have relieved many situations of which shippers were justly entitled to complain. Conditions which undisputedly existed in 1907 and prior thereto exist no longer. From the great and prosperous city of Rochester, which in 1907 was loud in complaint, not one witness has appeared upon this hearing to criticise in any particular the service rendered by railroads reaching that city. For such incidental evils as arise and will undoubtedly continue to arise from time to time, a remedy has been provided by law, and until it is shown to be inadequate it should be relied upon rather than resort to the creation of new and enormously expensive facilities upon which precisely the same class of troubles would inevitably occur.

PASSENGER SERVICE

It should not be overlooked that the applicant has made no criticism upon the passenger service rendered either by the Central or any other trunk line. It does not dispute that the entire passenger service rendered by the Central across the State is performed with all reasonable efficiency. No claim has been made at any time that there is a necessity for a duplication of facilities to take care of this class of service. It should also be noted that there is efficient high speed electric service from Buffalo to Rochester, Rochester to Syracuse, Syracuse to Utica, Utica to Little Falls, Fonda to Schenectady, Schenectady to Albany, Albany to Troy, thus leaving a break only from Little Falls to Fonda in this class of service from Buffalo to Troy.

WOULD THE PROPOSED ROAD BE HOPELESSLY BANKRUPT?

Beyond any question, the determination of the question of the necessity of the proposed road must largely lie in the solution of the question whether the earnings from its operation would be sufficient to pay any adequate and proper return upon the money invested in its construction. The law requiring the granting of a certificate of public convenience and a

necessity was enacted for the purpose of preventing the construction of bankrupt roads and for the prevention of the evils which would follow from such construction. If it is clearly apparent that a road will be bankrupt from the outset, the granting of a certificate of public convenience and a necessity would be a direct violation of the spirit and purpose of the statute which should not be tolerated.

The grave importance of this point has been clearly recognized by the applicant, which has submitted a large amount of testimony, supplemented by a large amount of argument, designed to show that the road would be, if not a profitable enterprise, at least a fairly remunerative investment.

In deciding this case upon the first hearing, the following question was submitted to vote: "Should we grant a certificate to a road which it is demonstrable will not be able to pay operating expenses, fixed charges, and set apart a reasonable sum for necessary additions and betterments?" and upon this question each and every of the Commissioners voted "No". The conclusion then reached is now adhered to as being the only conclusion which good sense and sound judgment will warrant. As a result of this vote careful consideration was then given to the question, will the proposed road pay a fair return on its cost, and the conclusions of the Commission upon that point are found in Vol. I of the opinions of the Commission, pages 578-595. In that opinion the question for consideration is stated in the following language:

In attempting to answer for the proposed road the question above propounded it is necessary to know just what income it must yield in order to offer a fair return upon the investment. As has been shown before, the estimate of the applicant is that the road will cost the sum of \$85,559,018, while that of the Commission is that it will cost in round numbers the sum of \$100,000,000. From these estimates results follow which may best be set forth in the following tabular form:

	<i>Estimate of Applicant</i>	<i>Estimate of Commission</i>
Total cost	\$85, 559, 018	\$100, 000, 000
Length in miles	297	297
Cost per mile	\$288, 077	\$336, 700

	<i>Estimate of Applicant</i>	<i>Estimate of Commission</i>
Net income yielding 5 per cent on cost...	\$4,250,000	\$5,000,000
Operating ratio, per cent.....	65	65
Gross operating revenue needed.....	12,142,850	14,285,741
Gross operating revenue per mile.....	40,885	48,100
Net income per mile needed to pay 5 per cent on cost	14,310	16,835

The Commission's findings are: Gross operating revenue required, \$14,285,741; gross operating revenue per mile required, \$48,100.

Taking the figures of the applicant to be correct, it will be observed that in order to pay the assumed rate of 5 per cent upon the investment, the gross operating revenue per mile must be the sum of \$40,885. This rate will yield a gross operating revenue of \$12,142,850, which, if we assume the operating ratio to be 65 per cent, would yield a net income of 5 per cent on the cost, or \$4,250,000. It is to be noted that the estimated cost per mile is \$238,077.

The question then is, will the road be able to earn these sums?

We do not understand that the applicant in any way questions this to be a fair statement of the problem presented for solution. On the other hand, we do understand that in its brief it substantially, if not expressly, admits that the statement is exact in all its details. Upon page 54 of the brief submitted upon this hearing, this admission is made in the following language:

On an examination of all the figures, it is fair to say that this road must earn gross \$12,142,850, and net \$4,250,000.

The applicant's brief next proceeds as follows:

The next practical question is, where is the business to be secured that is required to earn \$12,142,850? We estimate that we shall receive from passenger receipts from the town and rural population the sum of \$270,000, or \$1405 per mile, or 65 cents per capita per annum of the population. We estimate that we will handle of local freight, 400,000 tons agricultural outgoing freight, 100,000 tons of incoming freight, and 220,000 tons of manufactured products, making a total of 720,000 tons; local average freight haul of 150 miles, at one cent per ton-mile, a total that we will receive of \$1,080,000, making the total received from the local territory of freight and passengers of \$1,350,000.

This will leave to be earned from the carriage of through freight \$10,792,850. Assuming, as the applicant does, a rate of five and one-half mills per ton-mile on through freight, it

will require that the petitioner carry 6,541,121 tons of through freight.

The Commission upon the former hearing examined with great care the question whether it would be possible for the proposed road to earn a gross revenue of \$48,100 per mile, and reached the conclusion that it could not be done in view of the return per mile yielded by the operations of other roads. It is unnecessary to add to the discussion upon this point. The Commission has reviewed the discussion given in its former opinion and sees no reason to change the opinion there expressed, and upon that particular view of the case has nothing to add thereto.

The evidence in this case, however, covers matters which were not gone into upon the former hearing. The Central has caused to be made a complete analysis of all its freight business for the year 1909 covering the territory involved, and has submitted evidence and tables which it claims show fully all of the freight business handled by it in that year which could by any possibility have been secured by the proposed road had it been in operation. This evidence is of the highest importance, for the following reasons:

1. If the proposed road had been in operation in the year 1909, and had secured all of the business in question, excluding the Central wholly therefrom, we know the full amount of the business which it would have handled.

2. We may safely assume that it would have been impossible for the proposed road, if it had been in operation, to have secured all of this business, and therefore that the business handled by it would have been less than the total amount.

3. If the business which the proposed road would have secured in that year from the business actually handled would have left it bankrupt, we would then have to inquire whether it would have been possible for it to have secured from other sources sufficient additional business to put it in a solvent condition.

These considerations make it imperative to analyze with great care the evidence submitted by the Central as to the traffic actually handled, the sources from which it was derived, and the points to which it was delivered.

This traffic may be divided, for the convenience of consideration, into various classes: (1) Freight delivered to the Central by rail and water lines at the Niagara Frontier, being all of the freight coming from points west of Buffalo; (2) freight delivered to the Central at Buffalo, Black Rock, and North Tonawanda; (3) freight delivered to the Central at other points in the State of New York, destined both east and west; (4) freight delivered to the Central by the three New England roads: Boston and Maine, Boston and Albany, and the New Haven.

The following table is an analysis of all of the freight traffic received by the Central at the Niagara Frontier:

Freight Received at Niagara Frontier:

Under this heading is assembled all the traffic obtained by the Central from railroads and steamboat lines reaching Buffalo Niagara Frontier from the west, and all the traffic from Buffalo, Black Rock, and North Tonawanda which was destined for points which might be served by the proposed road. For convenience, this traffic is divided into two classes: (1) that destined for points in the State of New York; (2) that destined for New England points. The amounts given represent tons.

A. For New England Points:

	<i>Boston and Maine</i>	<i>Boston and Albany</i>	<i>New Haven</i>
1. Lake Shore	583, 277	693, 639	453, 306
2. Michigan Central			
3. Nickel Plate			
4. Pere Marquette			
5. Wabash			
6. Grand Trunk.....	120, 772	47, 054	36, 286
7. Pennsylvania			
8. Erie			
9. B., R. & P.....			

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	<i>Boston and Maine</i>	<i>Boston and Albany</i>	<i>New Haven</i>
10. Western Transit Co.....	77,758	39,470	66,182
11. Mutual Transit Co.....			
12. D. & B. Steamboat Co.....			
13. C & B. Transit Co.....	1,268	2,184	3,132
14. Buffalo, except Black Rock.....	116,549	163,770	67,199
15. Black Rock	3,822	6,759	7,490
16. North Tonawanda	12,245	9,666	16,383
Totals	915,691	962,542	649,978
Total to all New England points			2,528,211

B. For New York Points:

	<i>North Tonawanda</i>	<i>Rochester Utica Onondaga Troy</i>	<i>Syracuse Schenec- tady</i>	<i>Local</i>
1. Lake Shore	166,058	330,554	150,105	237,297
2. Michigan Central.....				
3. Nickel Plate.....				
4. Pere Marquette.....				
5. Wabash				
6. Grand Trunk	173,204	40,326	61,354	
7. Pennsylvania				
8. Erie				
9. B., R. & P.....				
10. Western Transit Co....				
11. Mutual Transit Co.....	16,565	7,229	13,770	
12. D. & B. Steamboat Co..				
13. C. & B. Transit Co....				
14. Buffalo, except Black Rock.....	17,278	143,447	69,780	140,591
15. Black Rock	8,782	16,529	16,670	12,431
16. North Tonawanda		53,667	13,742	33,192
Totals	192,118	735,639	299,219	499,799
Total for State				1,726,775
Total for New England				2,528,211
Total for both				4,254,986

The following five tables show all of the traffic obtained by the Central within the State of New York, other than at the Niagara Frontier, in tons, at the points named:

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ROCHESTER:

Westbound business:

1. To points west of Rochester in New York:		
Buffalo	16,469	
Black Rock	969	
North Tonawanda	4,675	
Local stations west.	18,168	
	<hr/>	40,291
2. Central roads (3) L. S.		
	35,108	
M. C.	16,637	
N. P.	1,016	
	<hr/>	52,761
3. Pere Marquette		
	2,485	
Wabash	744	
Grand Trunk.	1,711	
	<hr/>	4,940
4. Western Transit Co.		
	4,141	
Mutual Transit Co.	1,191	
	<hr/>	5,332
5. C. & B. Transit Co.		
	318	
D. & B. Steamboat Co.	208	
	<hr/>	526
	<hr/>	103,840

Eastbound business:

A. Points in New York:		
1. Syracuse	8,267	
2. Utica	2,962	
3. Oneida	1,832	
4. Schenectady	1,742	
5. Troy	1,439	
6. Local points	25,110	
	<hr/>	
Total New York state.		41,361
B. For New England:		
B. & M.	10,164	
B. & A.	15,685	
New Haven	12,292	
	<hr/>	
Total New England.		38,141
	<hr/>	79,502
Total westbound and eastbound.		183,342

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ONEIDA:

Westbound traffic:

1. To points west of Oneida in New York.....	4,414	
2. To Central roads (3) L. S.....	1,111	
M. C.	332	
N. P.	95	
	<hr/>	1,538
3. Pere Marquette	88	
Wabash		
Grand Trunk	9	
	<hr/>	97
4. Western Transit Co.....	94	
Mutual Transit Co.....	4	
	<hr/>	98
5. C. & B. Transit Co.....	12	
D. & B. Steamboat Co.	16	
	<hr/>	28
	<hr/>	6,175

Eastbound traffic:

A. Points in New York:		
Schenectady	32	
Troy	23	
Local	149	
	<hr/>	204
B. For New England:		
B. & M.....	348	
B. & A.....	498	
New Haven	264	
	<hr/>	1,110
	<hr/>	1,314
Total westbound and eastbound.....		7,489

UTICA:

Westbound traffic:

1. Buffalo	1,310	
Black Rock	316	
North Tonawanda	93	
Rochester	4,375	
Syracuse	6,090	
Oneida	1,722	
Local	10,608	
	<hr/>	24,512

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2. Lake Shore	9,123	
Michigan Central	5,414	
Nickel Plate	213	
	<hr/>	14,750
3. Pere Marquette	438	
Wabash	56	
Grand Trunk	160	
	<hr/>	654
4. Western Transit Co.	1,888	
Mutual Transit Co.	351	
	<hr/>	2,239
5. C. & B. Transit Co.	351	
D. & B. Steamboat Co.	129	
	<hr/>	480
	<hr/>	42,635

Eastbound traffic:

A. Points in New York:		
Schenectady	2,387	
Troy	1,430	
Local	12,837	
D. & H.	1,225	
	<hr/>	17,879
B. For New England:		
B. & M.	12,042	
B. & A.	6,449	
New Haven	8,503	
	<hr/>	26,994
	<hr/>	44,873
Total westbound and eastbound.....		87,508

TROY:

1. Buffalo	910	
Black Rock	66	
North Tonawanda	128	
Rochester	629	
Syracuse	837	
Utica	800	
Oneida	48	
Schenectady	11,684	
Local	4,517	
	<hr/>	19,619

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2. Lake Shore	16,299	
Michigan Central	3,300	
Nickel Plate	252	
		19,851
3. Pere Marquette	510	
Wabash	46	
Grand Trunk	350	
		906
4. Western Transit Co.....	5,464	
Mutual Transit Co.....	6	
		5,470
5. C. & B. Transit Co.....	249	
D. & B. Steamboat Co.....	153	
		402
		46,248

LOCAL POINTS:

To

1. Buffalo, Black Rock, North Tonawanda, Rochester, Oneida, Utica, Troy.....	168,328
2. Syracuse, Schenectady	46,480
3. New England:	
B. & M.....	42,951
B. & A.....	28,887
New Haven	33,592
4. Central lines: Lake Shore, Michigan Central, Nickel Plate	118,918
5. Pere Marquette, Wabash, Grand Trunk.....	14,456
6. Pennsylvania, Erie, B., R. & P.....	26,339
7. Western Transit Co., Mutual Transit Co.....	16,541
8. C. & B. Transit Co., D. & B. Steamboat Co....	5,094
	501,586

The following three tables show the traffic delivered to the Central by the Boston and Maine, the Boston and Albany, and freight received from the New Haven but delivered to the Central over the Boston and Albany, in tons:

BOSTON AND MAINE:

Received from and destined to

1. Buffalo, Black Rock, North Tonawanda, Rochester, Oneida, Utica	37,123
2. Schenectady, Syracuse	13,128
3. Central lines west of Buffalo.....	211,815

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4. Other lines west of Buffalo.....	12,618	
5. Central lake lines	5,691	
6. Other lake lines	866	
		<hr/> 281,241

BOSTON AND ALBANY:

Received from and destined to

1. Buffalo, Black Rock, North Tonawanda, Rochester, Oneida, Utica	22,343	
2. Schenectady, Syracuse	11,792	
3. Central lines west of Buffalo.....	145,126	
4. Other lines west of Buffalo.....	4,199	
5. Central lake lines	7,206	
6. Other lake lines	1,177	
		<hr/> 191,843

NEW HAVEN:

Received from and destined to

1. Buffalo, Black Rock, North Tonawanda, Rochester, Oneida, Utica	20,663	
2. Schenectady, Syracuse	26,662	
3. Central lines west of Buffalo.....	110,336	
4. Other lines west of Buffalo.....	6,781	
5. Central lake lines	19,626	
6. Other lake lines	1,328	
		<hr/> 185,390

The foregoing tables constitute a complete analysis of the sources and destination of all the traffic handled by the Central in the year 1909, which might by any possibility have gone to the proposed road, as shown by the evidence submitted by the Central.

The following tables are an analysis of the New England traffic delivered by the Central to the Boston and Maine, Boston and Albany, and the New Haven via the Boston and Albany, shown by the preceding tables:

To Boston and Maine:

From	
Niagara Frontier	915,691
Rochester	10,164
Oneida	348
Utica	12,042
Local	42,951
	<hr/>

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Total delivered to	981, 196
Received from	281, 241

Total ,	1, 262, 437
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To Boston and Albany:

From	
Niagara Frontier	962, 542
Rochester	15, 685
Oneida	498
Utica	6, 449
Local	28, 887

Total delivered to	1, 014, 061
Received from	191, 843

Total	1, 205, 904
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To New Haven:

From	
Niagara Frontier	649, 978
Rochester	12, 292
Oneida	264
Utica	8, 503
Local.....	33, 592

Total delivered to	704, 629
Received from	185, 396

Total	890, 025
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NEW ENGLAND TRAFFIC:

	<i>To</i>	<i>From</i>	<i>Total</i>
Boston and Maine.....	981, 196	281, 241	1, 262, 437
Boston and Albany.....	1, 014, 061	191, 843	1, 205, 904
New Haven	704, 629	185, 396	890, 025

Total	2, 699, 886	658, 480	3, 358, 366
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The interest in the foregoing tables lies in the summary to be made therefrom. The following is such summary, in tons:

Total of all traffic	5, 739, 767
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otal of all through traffic:

Eastbound	2, 528, 211
Westbound	526, 769

Total of all through traffic..... 3, 054, 980

The applicant's estimate of the through traffic required is.. 6, 541, 121

The actual amount of through traffic, as disclosed by the
foregoing tables, is 3, 054, 980

The shortage of the required amount is..... 3, 486, 141
being over one-half of the total amount required.

Further analysis of these figures is as follows:

The total number of tons actually carried was..... 3, 054, 980

Of this there was received by the Central at Buffalo from
the Lake Shore, Michigan Central, and Nickel Plate
roads, owned and controlled by it..... 1, 730, 222

Deducting this from the total of through traffic we have
a remainder of 1, 324, 758

There was also received by the Central, of the through
traffic, from its lake lines at Buffalo..... 183, 410

Deducting this leaves a balance of..... 1, 141, 348

There was also received by the Central in the foregoing
total from the Boston and Albany, which is a line
operated by it..... 157, 708

Deducting this from the foregoing balance leaves a
remainder of 983, 640

In this 983,640 tons is included all the traffic received by
the Central from Buffalo, Black Rock, and North Tonawanda,
which passed over the entire road, except what went to Troy.
Assuming that the Buffalo, Rochester and Eastern obtained
all of this traffic, the statement of tonnage would then be:

Required through traffic, according to applicant, tons.....	6, 541, 121
Actual traffic carried	983, 640

Shortage of required amount..... 5, 557, 481

The applicant estimates the rate to be five and one-half mills per ton-mile; the total length of the road is 297 miles; and therefore at this rate the sum received for hauling one ton the length of the road would be \$1.6335. The earnings for hauling 983,640 tons the length of the road would be \$1,606,775.

Translating this situation into dollars and cents, the account would stand as follows:

Gross earnings required, according to applicant, upon through freight	\$10, 792, 850
Actual earnings	1, 606, 775
Shortage of required amount.....	\$9, 186, 075

This astonishing result is reached by simply assuming that the traffic which the Central had secured west of Buffalo and east of the Hudson river, and which it was actually carrying upon its own rails, would not be transferred to the Buffalo, Rochester and Eastern to haul across the State of New York. It is assumed that the Buffalo, Rochester and Eastern would secure every pound of freight except that which it is certain the Central had already taken into its possession and would be required to surrender to get it upon the tracks of the Buffalo, Rochester and Eastern. Whether this is a violent assumption, requires no discussion.

The foregoing tables represent the freight traffic handled in quantities, to wit, tons. It is now desirable to analyze the amount of revenue which would have been derived from handling that portion thereof derived from or delivered to the Boston and Maine and New York, New Haven and Hartford railroads. The applicant has assumed as the average return per ton-mile the sum of five and one-half mills for through freight. Adopting this as the proper rate, and it is certainly a very close approximation to the truth, by the proper computations we obtain the following results in terms of dollars and cents:

Summation of Receipts from Tonnage Shown:

1. To Boston and Maine:

Niagara Frontier, 300 miles haul:

a. From Central lines west of Buffalo: Lake Shore, Michigan Central, Nickel Plate	\$1,084,895.22
b. From other lines west of Buffalo: Pere Marquette, Wabash, Grand Trunk, Pennsylvania, Erie, B., R. & P.	224,635.92
c. From Central lake lines: Western Transit Co., Mutual Transit Co.....	144,629.88
d. From other lake lines: C. & B. Transit Co., D. & B. Steamboat Co.	2,358.48
e. From cities: Buffalo, Black Rock, North Tona- wanda	246,665.76

Total \$1,703,185.26

2. From Boston and Maine:

To Niagara Frontier, 300 miles haul:

a. To Central lines west of Buffalo: Lake Shore, Michigan Central, Nickel Plate.....	\$393,975.90
b. To other railroad lines: Pere Marquette, Wabash, Grand Trunk	23,469.48
c. To Central lake lines: Western Transit Co., Mutual Transit Co.	10,585.26
d. To other lake lines: C. & B. Transit Co., D. & B. Steamboat Co.	1,610.76
e. To cities (all but Syracuse and Schenectady) Buf- falo, etc.	69,048.78

This includes more than to the Niagara Frontier
but the aggregate is so small that all cities are
put under this head.

Total \$498,690.18

Total both ways \$2,201,875.44

To Boston and Maine from Points in New York State:

Rochester, 230 miles	\$14,534.00
Oneida, 122 miles.....	264 48
Utica, 95 miles	7,104.78
Local, 150 miles average	39,944.43

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Total	\$61,847.69
Total of across state haul	2,201,875.44

\$2,263,723.13

Deductions:

From Central lines	\$1,084,895.22
To Central lines	393,975.90
From Central lake lines	144,629.88
To Central lake lines	10,585.26
	<hr/>
	1,634,086.26

Total balance	\$629,636.87
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Summation of Boston and Maine Traffic from Points West of Buffalo other than by Central Rail and Water Lines:

From rail lines	\$224,635.92
From water lines	2,358.48
To rail lines	23,469.48
To water lines	1,610.76
	<hr/>
	\$252,074.64

1. To New Haven:

Niagara Frontier, 300 miles haul:

a. From Central lines west of Buffalo: Lake Shore, Michigan Central, Nickel Plate	\$943,149.16
b. From other lines west of Buffalo: Pere Marquette, Wabash, Grand Trunk, Pennsylvania, Erie, B., R. & P.	67,491.96
c. From Central lake lines: Western Transit Co., Mutual Transit Co.	123,098.52
d. From other lake lines: C. & B. Transit Co., D. & B. Steamboat Co.	5,825.52
e. From cities: Buffalo, Black Rock, North Tonawanda, Rochester, Oneida, Utica, Local	223,429.45

Total	<hr/> \$1,262,994.61
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2. From New Haven:

To Niagara Frontier, 300 miles haul:

a. To Central lines west of Buffalo: Lake Shore, Michigan Central, Nickel Plate	\$205,224.96
b. To other railroad lines: Pere Marquette, Wabash, Grand Trunk	12,612.66

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c. To Central lake lines: Western Transit Co., Mutual Transit Co.	\$36,504.36
d. To other lake lines: C. & B. Transit Co., D. & B. Steamboat Co.	2,470.08
e. To cities (all but Syracuse and Schenectady) Buffalo, etc.	38,433.18
This includes more than to the Niagara Frontier but the aggregate is so small that all cities are put under this head.	

Total	\$295,245.24
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Total both ways.....	\$1,558,239.85
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CONCLUSIONS FROM THE FOREGOING

The significance of the foregoing figures can not well be overestimated. They are to be taken in connection with the fact hereinbefore found, that all of the traffic lines running eastward from Buffalo did, during the period covered, accept all the freight which was offered them during the year 1909 at the Niagara Frontier, and transport it eastward without delay and with efficiency. They are also to be considered in connection with the further fact that the movement of traffic from New England westward across the State of New York has not been the subject of criticism either upon the former hearing or upon this. The total through traffic which would have been possible for the proposed road to have obtained in the year 1909, had it been in existence, and taken all of that traffic which was in fact handled by the Central, fell short of its estimated amount of required through traffic by 3,486,141 tons, being over one-half of the total required amount.

It is incredible that any substantial portion of the freight which the Central had already in its possession upon its own or its subsidiary lines, would have been delivered to the proposed road for transportation, and deducting such traffic from the total amount required to make the road a paying enterprise, the shortage of the required amount would have been 5,557,481 tons.

The question, therefore, forces itself upon us, where would the proposed road have obtained this enormous amount of traffic? Where would it have come from and to whom would it have been delivered?

The substantial accuracy of the foregoing figures is unquestioned by evidence, and the applicant has in no manner attempted to show by definite and precise evidence how this tremendous shortage could have been made up. It is true, it has placed upon the stand one witness who has given general evidence derived from a very extensive study of the situation showing the enormous resources of the West and Northwest and the growth of traffic to and from that region; but it has, in our judgment, wholly failed upon this branch of the case to make any satisfactory or even plausible showing.

The answer to its contention is found in the fact that the through traffic is being satisfactorily taken care of at the present time, that there is no evidence showing that the existing facilities of the traffic lines are not able to take care of a large increase of traffic, and that if the increase should exceed the capacity of present facilities such capacity could be enlarged from time to time as might be required. We entertain no doubt that the main running tracks of the Central are capable of carrying a very great increase of tonnage, and that whatever increased facilities would be required for a long time in the future will be in the way of terminals conveniently situated for the accommodation of business.

THE ERIE CANAL

It appears to the Commission that a factor of very great importance in the financial success of the proposed road is to be found in the approaching completion of the enlarged Erie canal. The people of the State have deliberately voted the sum of \$100,000,000 for the purpose of enlarging the Erie canal. The reason for this expenditure is to be found in the desire of the public to afford a cheap method of trans-

porting freight from the Great Lakes to the seaboard at New York and from New York to the Lakes, in addition to whatever local business the canal may be able to handle within the State. The main line of the Barge canal extends from Tonawanda on the west to Waterford on the Hudson river at the east. Up to January 11, 1911, the time when former State Engineer Williams gave evidence before the Commission, the State had expended upon the canal the sum of about \$33,000,000. It had pledged itself in all to the extent of \$73,000,000, and had spent for engineering and other expenses about \$7,000,000, making the total liability incurred at that time of \$80,000,000. It is testified before us that if the present rate of progress is maintained the various portions of the canal should be ready for service as follows: the Champlain branch in time for the season of navigation of 1913; the Erie branch, from Waterford to Three Rivers, for the season of navigation of 1914; the remainder of the canal, from Three Rivers to Tonawanda, for the season of navigation of 1915. The total expense for the completion of this canal, with the Oswego and Champlain branches, will be upward of \$98,000,000; and in addition thereto, for the Cayuga-Seneca line, \$7,000,000. The original act carries with it an appropriation to provide two harbors, one for the city of Rochester and one for the city of Syracuse. There has been no appropriation for harbors at any other places. In order to obtain the proper use of the canal there must be provided harbors at various other points: namely, Tonawanda, New York, Troy, Utica; and in the smaller towns some system of vertical walls which will permit boats to lie alongside for the loading and unloading of cargoes. These harbors and terminal facilities will cost some millions of dollars in addition to the sums above named.

So far as possible, the canal is a canalization of rivers, and navigation is carried on in a series of artificial lakes formed by dams. Wherever the canal follows a river and the river is canalized, the channel is made in the larger streams 200 feet wide on the bottom and in the smaller streams 110 feet.

Where the canal is on what is known as the land line, its dimensions are 75 feet on the bottom and about 123 feet at the surface of the water. The locks are 45 feet wide, and it is not possible to operate a 45-foot barge in a 75-foot channel. The extreme barge that can be used in the channel as now planned could not be over 33 feet wide, but it can be anything under 300 feet long. A boat of these dimensions would carry about 2500 tons and draw about $10\frac{1}{2}$ feet of water. No definite plan or scheme has yet been fixed upon as to the size of barges. One scheme is to use small units and run a fleet of boats. There would be say five boats and a power boat, each one about 100 feet long and about $17\frac{1}{2}$ feet wide. These six boats could all be taken into a lock at one time and thus save lockage time.

The maximum theoretical tonnage which could be handled through the canal in one season, based on a boat 33 feet wide and 300 feet long, would be about 21,400,000 tons. The practical limit of tonnage with the canal as at present planned would be not to exceed 15,000,000 tons. As to the speed of transit, in tractive channels it would be possible to obtain a speed of at least four miles, and in the river sections five to six miles, an hour. There will be 36 locks between Tonawanda and Waterford, and it will take about thirty minutes to lock through one lock. The fair running time from Waterford to Tonawanda will be about three and one-half days. About forty barges a day could pass a given point, on an average, at this rate of lockage and rate of speed.

The Commission has found no one who could advise it authoritatively concerning just what part the Erie canal when completed will play in the transportation in this State. It is obvious, however, that the capacity to handle 15,000,000 tons easily through this canal will have a most tremendous effect upon the freight situation. A new railroad without feeders, designed as a traffic line to carry freight between the same points as the canal, has in the canal a competitor which it can not overlook or disregard. The canal is well suited for the economical transportation of heavy, slow-

moving freight, and we can not assume that it will not perform efficiently the function for which it is designed. It is certainly a factor which must be reckoned with in considering the financial success of the proposed road. Its existence is absolutely assured. It will compete for the identical freight from which the proposed road expects to derive nine-tenths of its revenues. It will be able to transport such freight at a lower rate than the applicant. These facts can not be ignored and must have weight in reaching a just conclusion as to whether the proposed road would necessarily be bankrupt from the outset.

FINANCIAL ABILITY OF THE APPLICANT

During the consideration given by the Commission to this case upon the former hearing, great attention was bestowed upon the financial ability of the applicant to construct and operate its proposed road. A very large amount of oral discussion was had, and finally, to ascertain the judgment of the Commission, written propositions were prepared and voted upon. The second proposition thus voted upon was in the following terms: "Has the applicant shown financial ability or backing sufficient to justify the finding that it is or will be able to finance the construction of the proposed road, assuming its cost to be \$100,000,000?" Upon this proposition each of the five Commissioners then in office voted "No".

Having thus voted, the Commission then proceeded to vote upon proposition three, in the following language: "If the answer to question two is negative, does that fact alone demand the application be denied, assuming that the decision be made upon the case as it now stands?" Upon this proposition each and every Commissioner voted "Yes".

It therefore appears that the judgment of the Commission in 1909 was that the applicant had failed to show sufficient financial ability to undertake the handling of the great enterprise it had projected, and for that reason the application should be denied upon the case as it then stood, one Com-

missioner dissenting as to the general conclusion, stating that opportunity should have been offered for further evidence.

This question of financial ability was fully discussed in the opinion of the Commission, such discussion commencing on page 605 and ending on page 612 of the opinion, as found in Vol. I of the opinions of the Commission.

A public hearing was held upon the application of the company for a rehearing on the 7th day of December, 1909. At this hearing, upon the question of financial ability, the attorney for the applicant used the following language:

We wish to, at the proper time, submit to the Commissioners the plan and the way in which we expect and believe we will be able to finance this proposition, and it goes without saying, and we realized it fully when we made our propositions in the arguments that we made here as to financing this matter when the hearing was on before—it goes without saying that *the Commissioners were entirely right in regarding that as a serious and a fundamental matter*. It is also entirely right that it is so serious and so fundamental that it must be approached with great care and with a regard to the standing of people already in the field, and it must be approached ever having in mind that the purse strings of the republic are held not by our friends. That being so, we expect, in spite of that, to ask as we hoped we might have been asked at the close of the other hearing to submit to this Honorable Board *the plan and the wherewithal by which and with which we expected to build this road*, and it is along those lines that we wish to be heard.

Here is a distinct admission by the applicant that the Commission in its former decision was entirely right in regarding the financial question as a serious and fundamental matter.

Here is also a distinct promise on the part of the applicant that it would submit to the Commission the plan by which the applicant expected to finance its operations. It is not too much to say that this distinct and unequivocal proposition upon the part of the applicant that it would produce satisfactory evidence upon this point had great potency in the minds of the Commission in granting the application for a rehearing.

So in the remarks made by counsel for applicant at that hearing, urging that a rehearing be granted, are to be found the following statements:

As to the finances: I do not think that I need to explain that upon that there is now, as there always has been, more or less of embarrassment, and there may be embarrassments arise in connection with finances other than the fact that you haven't got them. A man who is embarrassed in any given particular—it may not be because he can not explain and because he can not say, but it is because he does not want to. I maintained all along and I still think now, in spite of the ruling of this Commission, that we ought not to be required to go any further than we did go before; that the decision of the Commission upon that point—of course I have no criticism and no quarrel—it would do me no good if I had; and your Honors having made it and having placed your feet upon that ground, *why we will come to you and upon this rehearing we will present to you the plan which we propose for the financing and the building of the road.* If you compel us to do it, we will do it, and I believe we can satisfy you that we have the competency, that we have the disposition, that we have the ability, *and that we have the money.*

Again, counsel in his remarks also used the following language:

If you do that and give us a fair chance to present or represent, if our friends want to so describe it, represent these questions to you again, why we will do our best to clear up the things that we think ought to be cleared up and we will do the best we can to show you the error into which you fell in the opinion which you decided upon before.

This, of course, is a distinct affirmation of the ability and the intention of the applicant to clear up the things that ought to be cleared up, and the promise of the applicant that it would do its best in that direction; which included upon its own admission the question of financial ability.

At the hearing May 4, 1910, at which the applicant substantially closed its evidence, as shown at page 3315 of the minutes, counsel stated as follows:

Now, if the Commission please, that closes our testimony, subject only to the putting in of the matter which was spoken about this morning, the terminal in Buffalo. That will be a diagram. If there is any testimony relating to that it will be very short.

The surprise of the Commission at this announcement is but faintly reflected in the interrogation of the Chairman. "You have no other evidence to offer except that?" The answer was, "No; and then some statements, documentary, with reference to the financial standing and character of the gentlemen who make this application, if your Honors desire anything of that kind, and our ability to build the road. With that we close."

Some colloquy followed, in which this proof as to the financial standing and character of the gentlemen who made the application was spoken of as "some documentary proof as to the financial standing of the applicant for a certificate". Then the following:

Chairman Stevens: So you propose to offer no further proof upon the financial ability of the applicant to build and construct the road?

Counsel for applicant: Along that same line, the financial ability and standing of the applicants.

Mr. Carr: Do you mean by letters, such as are offered here?

Counsel for applicant: Yes.

Attorney for applicant: I think I did not quite make myself understood by Governor Black. Our case will be closed except the matter of what was brought up this morning as to a local freight and passenger terminal in Buffalo. Second, we will introduce evidence or wish to introduce evidence to the Commission with reference to our ability to build the road, and that evidence would have been here today except for the fact that one very important factor in the evidence could not arrive here today nor tomorrow. We did not know that until just before dinner. We would have been able to close entirely today except for that and what came up this morning. It was our purpose to close today. We will go on and put that in at any time at any adjourned hearing; but we thought perhaps there ought not to be an adjournment for that alone, because these matters would take a very short time, not over half a day's session or half of that.

Again, at page 3320, the attorney says:

We expected fully to close our case and were prepared on all the financial propositions, and we thought perhaps the next adjournment would not adjourn simply to take that testimony.

So late as May, 1910, it appears that the applicant intended to give at least some evidence regarding its financial

ability, in addition to that submitted before, although it must be observed that the language with which that intention is announced does not possess the force and vigor of that used upon the application for a rehearing.

It has in one form or another introduced the evidence used upon the former hearing, with the exception of the evidence of Mr. Gillette, the president of the applicant. Upon the original hearing Mr. Gillette was sworn in the case, but his evidence given at that time was not re-introduced nor was he called as a witness upon the rehearing, so that whatever evidence was given by the president of the road upon the original hearing, as to financial ability, is not before us at this time. To supply the additional proof required as to the financial ability, the applicant has sworn the witness James F. Jackson, an attorney at law residing in Brookline, Mass., who was a member of the Massachusetts Railroad Commission for a period of eight years. Mr. Jackson gives evidence that he is acquainted with nearly all of the subscribers to the capital stock of the applicant who live in Massachusetts, and that he has known of work done by such subscribers in the way of construction of electric railroad enterprises. As to the ability of the applicant itself to construct the road and its plan of financing such construction, the following is the entire evidence of this witness:

Why, I know there is outside capital available in case the certificate to build this railroad were granted. I have in mind knowledge of the attitude of one man in particular who is a man of large personal means and of large financial influence, represents a group of men. He is a man engaged in private business and he is prominent also in advising and counseling in the management of railroads, and I know the attitude taken by him in support of this enterprise, with the money that he commands himself and the money he undoubtedly would command from his associates. I think it (the proposed road) will be constructed, if permission were given, for several reasons: In the first place, because I know the past record and present ability of the men who are subscribers and their influence with those who possess other capital. I also know, as I have said, the capital that would be available that is not represented among the subscribers. Then I have

taken a general look at this enterprise from the standpoint of the public interests, and it seems to me that the enterprise in itself is one that must attract capital for certain reasons. One is that it opens up a market for many small communities, a market they do not possess at present, to the east, and it gives facilities for dealing with people in Massachusetts, with business men in Boston, and would afford an opportunity for mutual interchange of traffic. Then I understand, while I have not read the testimony in this case—and I would want it distinctly understood that I do not know the conditions in New York in any detail and I have not assumed to interest myself in that—still I do have this impression that there has been testimony here in large amount to show a demand for a railroad, and I am going, in forming my judgment, upon the theory that a large demand assures future usefulness. But there is a striking feature of the road which influences me more largely and has to do with my willingness to come here than any I have mentioned, and that is as I conceive the railroad situation, this line, connecting, if built, with the Fitchburg division of the Boston and Maine, now controlled by the New Haven, would give to Massachusetts and Boston and New England additional facilities of the most important character. I might say, that opinion I got at a hearing by the shipping public, by the business men and by organizations through the State represented on a bill that has passed the legislature last winter.

Mr. Jackson made some further discursive remarks upon interesting railroad questions, but the foregoing is the entire additional evidence as to the financial ability produced by the applicant and now before the Commission. Cross examination of Mr. Jackson developed the fact that he declined to give the name of the one man in particular who is a man of large personal means and large financial influence upon whose attitude he based his opinion. The Commission had no power to enforce an answer to this question, and therefore the case is barren as to the identity of the individual to whom he referred. It further appeared by the cross-examination that Mr. Jackson had made practically no investigation as to the feasibility of the enterprise, that he had not looked into the subject of how much the road would have to earn in order to succeed, that he had not investigated how much the road would have to earn in order to pay the interest on \$85,000,000 and its operating expenses. The

witness, upon further cross-examination, avowed some principles, some of which are as follows:

I am a firm believer that useless enterprises are a nuisance to the public and an unjust burden on the public.

I would say that I do not believe that a road that would result in disaster to its stockholders and disaster to its competitor is a good thing.

Q. Do I understand you to mean by that, that if a road goes into bankruptcy at the start but later on gets to be a success, that you would consider that a certificate ought to be granted?

A. No; a rule which we have always adopted — if I may be pardoned, I am somewhat diffident about referring to our rules — we adopted what we thought was wise in reference to bankrupt propositions so that if it was clear a given enterprise was going to be bankrupt we would not permit it to exist.

The witness further admitted that it was a subject of proper study to find out whether or not a particular enterprise would be a financial success and that he had given that branch of this case no particular study.

It is thus clear that whatever Mr. Jackson's opinions may be in the case as to the feasibility of the enterprise, he has given us absolutely no information as to the ability of the company to finance it. A claim that the evidence, above cited in full, affords any light to this Commission upon the power of the applicant to raise \$100,000,000 would be too ludicrous and absurd to require discussion.

It is plain that the case is barren of new evidence as to the financial ability, and that some of the evidence given upon the former hearing is not now before us. Under these circumstances the Commission has two courses open to it: first, to adhere to its former conclusion, the correctness of which was not seriously disputed by the applicant; or second, to reëxamine that evidence and consider whether its former conclusion was justified. That evidence was carefully and correctly stated in the opinion delivered before and requires no restatement at this time.

We have been unable to find any reason for departing from our former determination that the applicant has wholly

failed to show the financial ability, strength, and connections sufficient to undertake and carry to a successful conclusion the construction of the proposed road. We can not entertain the belief that the applicant for an instant supposed that this additional evidence upon this "serious and fundamental matter," using its own phrase, of financial ability was entitled to any weight or consideration at the hands of a tribunal required to deal with such grave and momentous questions. We may properly decline to speculate concerning its purpose, but we should not fail to point out, in view of remarks made during the hearing, that it is not consonant with the character or duty of this Commission to act upon specious hints unsupported by evidence or probability.

GENERAL CONCLUSIONS

We have now reviewed at some length the principal matters presented by the new evidence adduced upon the rehearing. It has not been thought advisable to restate the matters considered in the former opinion which then induced the conclusion that the proposed road was not a public convenience and a necessity. Except in one particular we now hold to the conclusions of fact then reached. Evidence has been offered by the applicant that since the former decision of this case the capacity of the Boston and Maine railroad has been materially increased. On the other hand, undisputed evidence was offered by The Delaware and Hudson Company that in December, 1910, and January, 1911, freight was held back to a large extent by reason of the inability of the Boston and Maine to accept it as offered. We do not consider this new evidence of such importance as to justify extended comment. There will necessarily be changes in details as years elapse, and no discussion of an existing situation will exactly fit the situations which will be presented two, three, or four years later. It is the broad considerations which now exist, and with varying details will continue to endure, that influence and compel judgment.

It is desirable to summarize as briefly as may be the chief facts as we find them upon which the decision of this case must be based. We think the state of the evidence warrants the assertion that the evidence supporting these findings is practically undisputed as to the greater part of them. This of course is not the case as to the cost of the road or character of the local service afforded by the New York Central.

a. That the applicant urges as well as concedes the overwhelming preponderance of traffic which it hopes and expects its proposed road would obtain is the transportation of freight across the State of New York originating outside of that State;

b. That the transportation of traffic originating within the State destined for points both within and without the State would not yield revenue at the outset, at least, amounting to more than \$1,350,000, as estimated by the applicant itself;

c. That the applicant has not shown any affiliation or business connection with any carrier, by either rail or water, at either its eastern or its western terminal, although it proposes to obtain all its through business from such carriers; while on the other hand an agreement on file with this Commission between the Central and New Haven companies shows an extreme improbability that the latter would find it advantageous to divert its business from the channels it is now seeking;

d. That it has not shown that it would be able to offer to connecting carriers at its eastern and western terminals any advantages in the interchange of business superior to those which would be offered by its competitors;

e. That it would not be able to offer any business to connecting terminal carriers except the small local business it might secure;

f. That it does not offer any reduction of rates or cheaper transportation, while on the other hand all its calculations

of probable earnings are based upon the rates maintained by its chief competitor, The New York Central and Hudson River Railroad Company;

g. That were the proposed road constructed, and should it secure a volume of traffic equal to all that was transported by the Central in 1909, which it could have in any way secured, had it then been in existence, such traffic would not amount to one-half the volume required to make the road financially successful;

h. That if from such traffic handled by the Central in 1909 there be deducted that which had come into the possession of the Central or its subsidiary lines before reaching the terminals of the proposed road, the entire remainder of such traffic would amount to only 983,640 tons, while the estimate of the applicant is that it would require 6,541,121 tons of through freight in order to be a financial success;

i. That the estimate of revenue from carrying 983,640 tons of freight the length of the proposed road is \$1,606,775, while the required earnings from through freight would be \$10,792,850, in order to produce a 5 per cent return upon the necessary investment;

j. That the through freight traffic, so called, is being satisfactorily and adequately transported by existing railroads;

k. That the facilities of existing railroads for handling the existing local traffic across the State of New York along and in the vicinity of the proposed road are adequate for the transaction of all existing business;

l. That the completion of the Barge canal, which is assured for the year 1915, with a carrying capacity of 15,000,000 tons annually, and which will offer facilities for the transportation of freight in competition with the proposed road, would have a very great adverse effect upon the earning power of the proposed road and its solvency;

m. That the proposed road would be unable to obtain any business from existing elevators and lake docks at Buffalo except over the tracks of existing railroads;

n. That the rail outlets at both the eastern and western terminals have no greater capacity than the existing rail facilities connecting therewith;

o. That the applicant has failed to show any congestion, delays, or inadequacy in the service of the existing roads sufficient in extent or character to justify the building of a new railroad as a necessary or proper method of relief to the public;

p. That the cost of the proposed road would be at least \$100,000,000, an average of \$336,700 per mile, which cost would require in order to return 5 per cent upon the investment a gross operating revenue of \$14,285,741 annually, or \$48,100 per mile;

q. That the applicant has failed to show financial ability or financial connections sufficient to justify the belief that it could construct its proposed road.

The foregoing findings of fact result necessarily in the findings which constitute a part of the resolution of this Commission denying the application herein. That those findings of fact compel the denial of the application does not admit of question or argument. We have heretofore in our former opinion in this case stated the reason and policy of the law as we understand it. That law has been in existence for many years. Its policy has been extended from time to time, showing that it met the approval of the public and of the Legislature. The law has been construed in various cases by the courts of the State, in which they have uniformly held that the purpose of the law was to prevent the construction of railroads in cases where the existing railroads afforded reasonable facilities for public use, to preclude loss to investors by preventing them from engaging in alluring but deceptive schemes, to protect existing railroads engaged in the public service against undue and unreasonable competition. We need not cite or elaborate upon these decisions, for they are too well known and their doctrine is too firmly established to require their exposition or defense.

In fact, upon the general principles involved, we can see

that there is no real difference of opinion. A single illustration will perhaps establish this. It is entirely feasible from an engineering point of view to construct not only the proposed road but also one or more other roads across the State substantially parallel to the Central. The proposed road does not occupy the only available strip of land upon which a railroad can be constructed the length of the State which would be practical and practicable from an engineering point of view. If the construction of two such roads at this time were proposed, and both applications were pending before us, everyone would recognize that one or the other would fail because of the perfectly obvious reason that two such roads constructed at one time would be in excess of all existing requirements and of all probable future requirements during any period of time which could properly be considered. No one would require long hearings and the taking of voluminous evidence to establish this fact. It would be recognized by unanimous consent.

When, after two long and exhaustive examinations of the subject the Commission finds as a fact that the existing facilities are adequate for existing needs and are or can be made adequate for all probable future needs, and in the judgment of the Commission will be so made, that the construction of the proposed road would result in a practical loss of capital invested in existing facilities, the same conclusion must inevitably follow. It is impossible to conceive a case which would require the negative of the Commission if upon the facts found this application ought to be granted.

The economic principles involved are of the greatest gravity. The waste arising from the unnecessary duplication of facilities, the inevitable loss to investors entailing discredit to other securities, however meritorious, offered by transportation corporations, the impairment of service which invariably follows cut-throat competition growing out of fierce struggles to pay operating expenses, the inability of lines forced to such a competition to develop with growing requirements because of difficulties in attracting fresh

capital — all of these matters are elementary and it would be a work of supererogation to dwell upon them.

There are a few other considerations which perhaps should receive brief notice at this point. The Commission is aware that there is a somewhat prevalent feeling that if a party of men are willing to invest their money in a scheme and take the chances of the results, it is not a part of the function of the Commission to deny them the privilege upon the ground that loss would ensue to them. It is urged that the Commission is not the guardian of such people. Those entertaining this view overlook one important, and to our minds controlling, consideration. The promoters of this enterprise, so far as we are aware or advised by the evidence, do not propose to invest their own money in the scheme, and in fact the evidence shows that all of the parties interested in the scheme have not the money sufficient to construct the road. They propose to invite others to invest their money in the enterprise, and it is people who are entirely unfamiliar with the situation who would be required to furnish the necessary money for the road to be built. It so happens that the courts have properly held that a necessity does not exist for the construction of a railroad unless the situation is such that it will afford a reasonable return upon the capital invested. A decision of this Commission that the proposed road is a public necessity is a finding upon which the public would have a right to rely, and upon which it incontestably would rely, that the road would in all human probability afford an adequate return upon the money invested in its construction. The decision of the Commission would unquestionably be paraded before would-be investors to satisfy them that they could safely put out their money in this scheme with a just expectation of an adequate return thereon. The Commission can not be expected to make a finding which would produce such a result, unless it were thoroughly satisfied of the correctness of such finding.

There is also a suggestion that the expenditure of money in the construction of the road would be of such great benefit to the localities through which it passes, and that the addition to local taxable values would be so important as to make these considerations of weight. We need only point out that these matters have no possible connection with the results which would follow from the operation of the road after its construction, and that such results are the only matters which have any proper bearing in the determination whether the proposed construction is a public convenience and a necessity. The necessity must be for the transportation of freight and passengers. Incidental and transient benefits arising from any construction, however needless and wasteful, will always occur, but they are not to be treated as justifying economic waste.

From the whole case, therefore, and for the reasons stated in this and our preceding opinion, and embodied in the findings of fact stated in the resolution denying the application, this application should be denied.

All concur. Commissioner Decker files a concurring opinion.

DECKER, Commissioner (concurring):

I prefer to state my concurrence in a separate opinion.

The policy of the State is to encourage, and not discourage, great public improvements, including the building and operation of railroads, and I am very sure that every member of this Commission has sought diligently to find grounds upon which, having in mind his sworn public duty and the interests of the State at large, to base approval of this application.

When a duly organized railroad company comes before the Commission for a certificate of public convenience and a necessity, and for its permission and approval to begin construction and exercise the privileges of a common carrier by railroad, the three principal subjects of inquiry are: 1, the

probability of successful operation; 2, the improbability that the new road when in operation will take continuously an undue share of the traffic of an existing railroad which is itself being operated generally in the satisfactory service of the public; and 3, that the new company is fortified with financial resources sufficient to build and put the proposed railroad in proper operation, and actually intends to construct and operate the road within a reasonable period of time.

As railroad enterprises have become developed by additions and consolidations, and affiliations through stock owning control, into great systems, and a very large and constantly increasing part of the Nation's wealth has been and is being spent in their original cost and always required improvement, the policy of the State has extended necessarily to the fair protection of the immense aggregate investment so represented; and so, during the past ten or fifteen years at least, it has become recognized that while new railroad building to and even beyond the full saturation of present and probable early future public demand should be encouraged and promoted in every fair and prudent way, the launching of a new railroad corporation to build and operate a parallel line for active competition with a well established railroad system is not to be a matter of course, but a subject of patient and diligent inquiry, involving surely the three above stated tests.

Because of the constant tendency toward system development and the taking in of branch feeders, and the resulting saturation of traffic requirements, it has become increasingly difficult successfully to construct and operate independent lines in already occupied territory. Such a line ordinarily can secure from its connections a volume of traffic depending largely upon what it can itself deliver and upon the needs of the territory or localities which it may exclusively serve. Therefore, unless it is assured under peculiar circumstances of a large volume of business such as coal, iron ore, or grain, or the field of its own operations is rich in traffic production,

its success, since through business to be obtained from other lines is a determining factor, is extremely problematical. The point made in this connection is that with occupation of the general territory by railroad systems the difficulty of securing the necessary large foothold in traffic by an independently built and operated intermediate line of railway is increased enormously. That fixed economic law of railway business and operation is fully exemplified in this case, where the new line is proposed as an intermediate carrier to be inserted as a competitor for through business, and which is relied upon as its great source of revenue. It is in no sense shown to be supported by an affiliated line on the west or on the east having any special interest in giving it business, and there is no showing that any great amount of free lake grain can or will seek its rails. It is merely an independent local line within the State of New York depending upon the hazards of the future for those alliances with other lines on the east and west for a sufficiency of through business, and subject to the competition for that business of a group of the strongest railroad systems of the United States, besides the enormous absorption of through grain and other heavy traffic which is certain to follow the opening of the Erie Barge canal. These are not theories; they are facts. It is because they are facts that the New York Central has been able to present its showing of how little of this through business the new line can expect to obtain. It is because they are plainly indicated in this record that the Commission has been forced to find, upon that record, the glaring, unmatched, dominant fact that the proposed road can not pay a return upon the first cost of its construction and equipment for operation.

If, on the contrary, this proposed railroad is to be closely allied with and practically maintained by an existing prosperous system such as the New Haven, with its controlled Boston and Maine and other properties, in the East, the adverse economic conditions above stated would be greatly modified or nonexistent. And the like result would appear

from a similar alliance with the great Grand Trunk system on the West. Not a scintilla of proof is before us upon which the existence of any such supporting alliance can be found.

If an alliance of that character were shown, or any proof had been presented to match the otherwise demonstrated inability to operate successfully, even though such proof had to be general in character if it were only fairly satisfying as to scope, the Commission might well feel bound to resolve its doubts in favor of the applicant upon that branch of the case.

I am impressed, as all must be, with one condition that makes for the applicant's contention. The road could hardly be completed under five years. Judging by the past tremendous increase in our population and our knowledge that it is certain to increase in large ratio with each succeeding census period, whatever may be the situation now, whatever we may believe as to the ability of the existing lines to carry this through business which is conceded to be the business that must chiefly support this new road, it is certain that the present service reserves in the existing lines and those resulting from improvements already under way will be very largely used under the requirements of our multiplying population and the demands of our constantly extending industries which will be manifested after the expiration of five or ten years. I am an optimist as to the business development of this country and the increasing transportation needs of the people. If the export of grain is to cease through use of that grain in the manufacture of grain products, and those products are to be consumed wholly by ourselves, the character of the transportation is changed merely from foreign to domestic, from long to shorter hauls of grain and shorter hauls for mill products, to greater demand for manufactured products of all kinds, and to the movement of traffic of all descriptions from more numerous sources of production. The character of the transportation may change greatly, but the total volume can hardly diminish, and in the nature of things it ought

greatly to increase. But all this is very far from saying that there will be an actual great excess over what the existing roads will control and properly carry at the end of five or six or seven years sufficient to enable the proposed road to earn a small return upon its cost. I have indicated, I think, that the applicant's proof falls far short of furnishing the basis of probability as to traffic and earnings which would enable the Commission to find in its favor upon that important point of the case.

Something is intimated on behalf of the applicant, that if not secured otherwise sufficient traffic could and would be obtained by rate reductions. Assuming that destructive rate competition would for the time being draw a large amount of business to the new line, it is plain that could be done only by operating the road at a loss. The established systems with their resources can bear that loss longer than the new road can, rates must soon again find a natural level, and no result would follow that experience other than depreciated properties of the railways involved, loss to railroad investment holders, and the probable early bankruptcy of the new company. Moreover, through railroad business is conducted under joint tariffs of rates, and it is too much to suppose that the eastern or western connections of the proposed new line would join in rate cutting at all or to any such extent as would be necessary to bring the Buffalo, Rochester and Eastern its necessary share of the competitive through business. In any event the results would be disastrous: the existing lines would be deprived temporarily of a large and undue share of traffic which is naturally theirs and which they would certainly regain. The public is vitally interested in having and enjoying reasonably low rates. It is just as vitally interested in the prevention of unreasonably low rates; for the first demand of commerce today is adequate service, and that service must be paid for. It can not be donated. There is no public necessity shown or public convenience indicated in or by destructive rate cutting for competitive business which pro-

ceeds until the competing carriers reach the point of exhaustion, and the necessary cessation of hostilities through rate restoration then must be followed by a long period of gradual restoration to normal standards of service and efficiency of administration. The people are benefited by healthy competition at compensating rates, but it is enough to say for this case that such healthy competition plainly would not bring the necessary amount of traffic to the proposed road under the showing made on the record before the Commission.

In my judgment, the failure of the applicant to show any financial ability to build and equip this railroad constitutes the controlling defect in this case. If supplied, such proof would go far, in connection with the natural increase in population and traffic, toward matching the proof of the New York Central that the new line can not get a sufficient amount of business. As the record has been submitted, the proof of insufficient business stands undisputed and unaffected by countervailing proof as to other subjects. Now, suppose that notwithstanding the apparent lack of traffic for the new line as indicated by such proof of the opposing line, the applicant had produced representatives of banking houses accustomed to handle large financial projects involving a hundred or more millions of dollars of expenditure, and by them had shown that a certain proper amount of stock had been arranged to be sold at par for cash, and that the bonds of the company would be promptly underwritten at a reasonable discount if not at par, that the entire scheme had been thoroughly investigated and found feasible from the investors' and therefore the earnings standpoint, that there would be traffic alliances, arranged for and certain to be made, which guarantee a sufficiency of business for the new line in connection with the estimated amount due to location of industries along the line, that while the financial arrangements had been definitely fixed a necessity exists for not going into every detail in regard thereto. If that kind of proof had been presented, with such

precision as of itself would indicate full verity, a very different case would be before the Commission. We would have then, in opposition to the proof presented by the objecting railroads, the judgment of the men who stand for the investors and reflect the views of the investors themselves. Those who control large investments of money in this country are thoroughly equipped with expert aid to investigate and determine the question of success or failure of a proposed enterprise of this character. The greater the magnitude of the enterprise the more important it becomes to have knowledge concerning the attitude of those who must be relied upon for financial coöperation. To my mind, proof of that character would have supplied strong support to the application and have enabled the Commission to settle many questions in favor of the applicant. I do not say that the proof upon this subject must necessarily have been just as I have stated, or that something more might not have been required, but I do say that the utter lack of such proof, in the face of the complete showing otherwise made that the road can not pay, is fatal to the applicant's case.

It is idle to say that any such showing would disclose situations to the foes of the new road and thereby enable them to defeat the whole financial scheme. No railroad of this size which it is seriously proposed to actually build can proceed through the process of organization, survey, preparation of plans, and application to the Commission for legal authorization, all involving the expenditure of a large sum of actual money in themselves, unless the financing of the project has been arranged for or the project itself is based upon speculation. Such speculation may be of two kinds, trading afterward upon the approved franchise right thus secured, or expectation that the proposed location of the line through the stated territory will attract financial aid after the certificate of authority shall have been granted. It has been declared on this record that the financing of the company is assured. If so assured, proof of the general

character above outlined should have been easy to procure. None has been presented.

A proceeding before the Commission upon an application for a certificate of public convenience and a necessity does not present an administrative question. The question is essentially judicial and has been so held by the courts. The case may come before the Appellate Division, not by injunction or certiorari, but upon direct appeal. In such a case this Commission is, as the courts are, limited by the case record. Certainly the Commission can not utterly disregard the whole weight of evidence as presented. We must hold, in the absence of any proof that the company can secure the money to build this road, and in face of the fact that the Commission has several times informed the applicant that such proof is indispensable, that the record shows no indication that the railroad here proposed will be constructed and put in operation by the applicant company, that the claim seriously and urgently insisted upon that it is able to build the road is wholly unsupported by necessary proof.

The numerous petitions and the mass of individual opinions expressed in testimony in favor of the applicant's petition are all based upon the assumption that this road can be built by the applicant company. As matter of fact, such petitions and testimony are all to the sole effect that the localities along the proposed line need and want *a railroad*, not necessarily built by this company, but by some company. I give the full weight to those petitions and such testimony. I understand fully that many residents and business interests of Buffalo earnestly desire this railroad, that the cities, villages, and farming communities along the proposed line desire this railroad, and if the road could be successfully built and operated it might well be held that it would benefit all communities. This company has shown no ability to do either. Some other company may, or this company may upon the new application it is entitled by law to file one year hence. If this Commission, upon this record of demonstrated inability on the part of the applicant to build or successfully

operate the road, should grant the certificate and permission and approval asked for in the petition, it must disregard wholly the overwhelming weight of evidence and lack of evidence, and say merely because this company wants such certificate and permission and approval we will grant them; that we will give this company the right for a long term of years to hold practically the only available location left for construction of a railroad across this State, covering a distance of three hundred miles, quite oblivious to the possibility that this may be a speculative project in nowise benefiting the people along the proposed line, and that it may shut out another company actually showing ability to build a line along the stated route. That is the legal effect of a favorable decision in this case as the case record stands. It is the clear duty of this Commission to guard against such a result in the interest of the people along the proposed line as well as in the interest of the State at large. It should be understood clearly and definitely that the Commission reflects in no way upon the good faith of any one connected with the proposed road, and that its criticisms are directed solely to the record of this case.

**In the Matter of the Complaint of M. J. WHEDON *against*
THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD
COMPANY and the BUFFALO, LOCKPORT AND ROCHESTER
RAILWAY COMPANY.**

The charge of The New York Central and Hudson River Railroad Company and of the Buffalo, Lockport and Rochester Railway Company for a round-trip ticket from the village of Medina to the city of Buffalo is \$1.20. The charge made by said companies for a round-trip ticket from Medina to the city of Rochester is \$1.60. The village of Medina is situated 41 miles from each of said cities. The reason for the difference in charge is the competition of the International Railway Company with respondents from the city of Lockport to the city of Buffalo, and a round-trip rate from Medina to Buffalo is made for the purpose of practically meeting the competition, the sum of the fares from Medina to Buffalo upon the trolley roads with the change at Lockport being \$1.14 for the round trip. In addition to the foregoing facts, effective January 19, 1901, a round-trip fare of \$1.20 was established by the New York Central between Medina and Rochester, and was in effect until February 20, 1908. Also, the Central maintained a one-day, round-trip fare between Medina and Rochester, at substantially the rate prevailing between Medina and Buffalo, on Saturdays and Sundays from May 28, 1910, to October 30, 1910, and some holidays.

The Buffalo, Lockport and Rochester Railway Company sells books of transportation containing coupons good for 300 miles of transportation over its lines for \$5, which is at the rate of 1½ cents per mile. This rate is good at any time and on any car. The said company sells a special excursion ticket from Medina to Rochester and return for one day, which ticket is good only on the train leaving Medina for Rochester at 6:28 o'clock in the evening and is good to return from Rochester to Medina on any train leaving Rochester the same day. This excursion ticket is put on during the winter season only, to encourage travel to the theaters in Rochester, and is used only when the theaters are open.

Upon the foregoing facts, and these only, the complainant alleges that the regular fare of 2 cents per mile between Medina and Rochester is unreasonable because excessive, and asks that the rate be reduced to that prevailing between Medina and Buffalo, to wit, practically 1½ cents per mile.

Held, That the above facts do not show that the regular rate of 2 cents per mile between Medina and Rochester is excessive and unreasonable.

The reasons which make it permissible for a carrier to accept a rate lower than the general level in order to get business which it can not otherwise obtain, stated.

The existence of excursion and commutation rates and the sale of mileage books at a less price than the general level of the rate per mile do not justify a finding that such general level is excessive and unreasonable.

Decided August 29, 1911.

M. J. Whedon, complainant, in person.

W. L. Marcy for the Buffalo, Lockport and Rochester Railway Company.

Ernest S. Ballard for The New York Central and Hudson River Railroad Company.

STEVENS, *Chairman*:

The complainant, Milton J. Whedon, on the 16th day of August, 1910, filed with this Commission a complaint against The New York Central and Hudson River Railroad Company and the Buffalo, Lockport and Rochester Railway Company, with reference to rates of passenger fare charged by said two companies for transportation from the village of Medina to the city of Rochester. After stating in his complaint the rates of fare charged, he alleges "that said rates and the charges made as set forth herein constitute an undue and unreasonable preference and because thereof this complainant and the village of Medina suffers damage". He further alleges that the fares charged between Medina and Rochester over the lines of respondents are "unjust, unreasonable, unfair, and in excess of that which under the existing circumstances and conditions should be charged," because of the fact that the fare from Medina to Buffalo, a distance of 41 miles, is less than that from Medina to Rochester. The gravamen of the complaint is, substantially, that discrimination is exercised as to the charges between Medina and Buffalo.

on one hand and Medina and Rochester on the other, but the complaint does contain one allegation reading as follows: "That the charge for passenger transportation between Medina and Rochester, one way or round trip, is an unreasonable and unjust charge."

The complainant had previously filed a complaint against The New York Central and Hudson River Railroad Company, upon which complaint a hearing was had and a decision was rendered June 22, 1910, the decision being accompanied by a written opinion. In that complaint substantially all of the facts appearing in the present case were brought out, and the Commission held, for reasons stated in its opinion, that there was no unjust or unlawful discrimination by reason of the difference in rates. Upon the hearing in that case the complainant expressly admitted that the charge made by the New York Central of \$1.60 for a round-trip ticket from Medina to Rochester was not unreasonable in itself, and he explicitly disavowed any intention to claim that such rate was unreasonable, and his complaint in that case was expressly based upon the sole ground of discrimination.

Upon the filing of the present complaint a letter was addressed by the Commission to the complainant, asking him wherein his complaint differed from the one already disposed of by the Commission, and to this inquiry the complainant answered:

Referring to your favor of the 16th inst. relative to the petition for changing rate of transportation between Medina and Rochester, would advise that this petition covers entirely different grounds from the one upon which there has already been an adjudication; it is not the same subject matter; nor are the causes for the request the same. It is founded strictly upon the merits set forth in the petition, namely, in substance, that the rate now charged is too high, sufficiently so as to make it unreasonable.

This explicit declaration by the complainant was treated by the Commission as constituting an avowal that the complaint in this case was wholly against the reasonableness of

the charge, and that the decision of the Commission that there was no discrimination in the different rates stood unchallenged.

Upon the hearing in this case, after the preliminary statement by the complainant, he was asked: "Your position is that the rate charged is an unjust and unreasonable rate?" To this he replied, "That is it; yes, sir". After the complainant had rested his case and the respondents had entered upon their defense, the Chairman of the Commission said: "There is no question of discrimination before the Commission at this time, whatever. I would state for the information of the respondents that before this complaint was served upon them correspondence was had with Mr. Whedon calling his attention to the fact of whether it was or not, and his letter is on file." The Chairman then read the letter, and continued: "So I make this statement that it is not upon discrimination in consequence of the letter. If I am not interpreting it correctly, Mr. Whedon will correct me." To this the complainant responded: "That is true. I make no contention at this time in regard to discrimination." It therefore appears that whatever the language of the complaint may be, the complainant in fact bases his case upon the unreasonableness of the charge made and raises no question as to the correctness of the ruling of the Commission concerning discrimination made in the former case, and the discussion herein will, therefore, be confined wholly to the charge of unreasonableness made against the rates.

The facts are within a very brief compass. The village of Medina, in which the complainant resides, is situate upon the lines of the roads of the two respondents. The line of The New York Central and Hudson River Railroad Company extends from New York to Buffalo, and the line of the Buffalo, Lockport and Rochester Railway Company extends from Rochester to Lockport, there connecting with the International Railway Company which has a line to Buffalo.

Medina is 41 miles from Buffalo and a like distance from Rochester. The fares charged upon both roads are as follows: From Medina to Buffalo, one way, 65 cents; from Medina to Rochester, one way, 82 cents; round trip from Medina to Rochester upon both roads is \$1.60, while a round-trip ticket from Medina to Buffalo over the line of the Central is \$1.20, and over the line of the Buffalo, Lockport and Rochester Railway is \$1.10. The New York Central, of course, is operated by steam, and the motive power of the Buffalo, Lockport and Rochester Railway Company is electricity. This Buffalo rate was established by the Central to meet the rate of the International Railway Company from Lockport to Buffalo. That rate of the trolley company was put in to meet the rate of the Central.

There are four additional facts, two relating to each company, shown in the evidence and undisputed, which are relied upon by the complainant to establish the charge of unreasonableness.

As against the New York Central:

1. Effective January 19, 1901, a round-trip fare of \$1.20 was established between Medina and Rochester by The New York Central and Hudson River Railroad Company and was in effect until February 20, 1908.

2. A special one-day, round-trip fare between Medina and Rochester, at substantially the rates prevailing between Medina and Buffalo, was given by the Central on Saturdays and Sundays from May 28, 1910, to October 30, 1910, and on some holidays.

As against the Buffalo, Lockport and Rochester Railway Company:

1. This company sells books of transportation containing coupons good for 300 miles of transportation over its line for \$5, which is at the rate of $1\frac{2}{3}$ cents per mile. This rate is good at any time, on any car.

2. The Buffalo, Lockport and Rochester Railway Company sells a special excursion ticket from Medina to Roch-

ester and return for \$1, which ticket is good only on the train leaving Medina for Rochester at 6:28 o'clock in the evening, and is good to return from Rochester to Medina on any train leaving Rochester the same day. This excursion ticket is put on during the winter season only, to encourage travel to the theaters in Rochester, and is used only when the theaters are open.

Upon the foregoing facts, and these only, the complainant contends he has shown conclusively that the rates charged by the respondent companies between Medina and Rochester are unreasonable because excessive. The questions raised for determination by this contention are —

1. Do the facts stated tend to show that a rate of two cents a mile from Rochester to Medina is excessive?

2. If they do tend to show that the rate is excessive, are they sufficient in and of themselves to establish that conclusion?

Both questions must, under all the circumstances of the case, be answered in the negative.

The lowest rate of fare upon steam railroads charged in this State, except in peculiar and exceptional cases and commutation rates, is two cents a mile. The residents of Medina are, by reason of the competition of the International Railway Company between Lockport and Buffalo, accorded a rate to Buffalo and return more favorable by 25 per cent than the regular and customary rate of two cents a mile. The supposed wrong from which they suffer, because the exceptional advantage in the Buffalo rate is not extended to them in other directions, seems to be so keenly felt by the complainant that it seems wise to explain fully why the Commission finds itself unable to give to them as a right an exceptional rate to Rochester which they obtain by happy chance to Buffalo.

In the first case brought by complainant upon this state of facts, the complaint was that the Rochester rate was discriminatory; and the complainant, although then aware of all

the facts now presented, clearly disavowed all claim that the Rochester rate was unreasonable in the sense of being excessive. The change of position is probably brought about by a feeling that the uncontroverted facts in some way constitute an injustice to the people of Medina which should be removed if possible. It should, therefore, be pointed out clearly that no injustice is done Medina solely because of the fact that the rate to Rochester and return is greater than the rate to Buffalo and return. If the rate to Buffalo and return were raised to \$1.60, the Rochester rate, the latter rate would be no more just than it is now; and in passing upon the question in such case, whether it is unreasonable because excessive, precisely the same considerations would determine the conclusion as must govern in the present case.

It is a sound principle in rate making, and well recognized by every governmental and other authority having control of such matters, that it is permissible as well as good policy for a railroad company to accept low rates on traffic which can be obtained only in this way. Traffic carried at such rates may be and often is unremunerative in the sense that its contribution to the general expenses of the company is inadequate; but so long as it contributes anything at all it may be worth the company's while to carry it. It is to the advantage of a company to handle a given traffic if it receives therefor a sum but slightly in excess of the out of pocket expenses attributable to that particular traffic, provided it could not obtain it otherwise. There is no dissent from the proposition that a railroad must afford an exceptionally low rate when it meets in competition a water carrier or lose the business. Such a rate is lower than the general level of rates obtaining where such water competition does not exist, but no one has ever supposed that this fact alone constituted ground for claiming that such other rates were excessive. If it were held that the existence of the low water competitive rates was conclusive evidence that the non-water competition rates were excessive, one of two

results would necessarily follow: either the competitive water traffic would have to be lost, or all rates would have to be reduced to the level of water rates. The latter, as is well known, could not be done without ruin, since it is not possible for a railroad to carry all its traffic at rates which can be afforded by a water carrier. On the other hand, it can afford to carry some of its traffic at water rates, provided those rates will pay the direct expense assignable to such traffic and a little more, rather than to lose it.

A majority of freight traffic in this State moves east. This involves a large westward movement of empty cars. If a railroad company can get any freight in these cars, it is practically the gainer by nearly the charges paid, since the expense of hauling the train is incurred in any event and the additional expense of hauling the freight is trifling. It is the principle covering this situation which not only justifies but compels varying rates if traffic can not be obtained without them.

The low Buffalo rate from Medina, as has been shown in both cases, is primarily compelled by the rate charged by the International railway from Lockport. Unless that rate is met by the Central, the latter would lose the haul from Lockport to Buffalo, and yet would be compelled to run its trains at practically the same expense at though it held the traffic. That company must therefore choose between losing the traffic or taking it at the lower rate. If it can make anything by taking it at such lower rate over and beyond the extra expense it would be subjected to by reason of moving the business, good policy and sound sense demand that it put in the lower rate and get the business, provided otherwise it would lose it.

These very elementary considerations show the fallacy in the line of reasoning which convinces the complainant that he is justified in his complaint. If carrying passengers from Medina to Buffalo and return for \$1.20 shows conclusively that a charge of \$1.60 for a trip to Rochester and return is

excessive, the distance being the same, it shows just as conclusively that a charge anywhere east of Rochester greater than the Buffalo rate per mile is excessive. If we were to reduce the rate from Medina to Rochester to a cent and a-half a mile because two cents is excessive, it would be our duty to reduce all local rates on the Central to a cent and a-half per mile. There is nothing peculiar about the Medina-Rochester service. It stands on precisely the same footing as the service from Rochester to Batavia, or Rochester to Auburn. Following the argument to its logical conclusion, a decision in this case that the rate from Medina to Rochester must be reduced because it is greater than the rate to Buffalo, would demand a cut all over the Central lines to one and a-half cents a mile. On the other hand, the logic of the complainant is that if the Buffalo rate were increased to two cents a mile, in that case the present Rochester rate would be reasonable and just.

It requires no elaborate discussion to show that rate making must proceed upon other and broader reasons than those invoked by the complainant. He practically demands that all passenger rates upon the Central be reduced 25 per cent. It is certain that this would yield less than the cost of performing the service. Such a result demonstrates conclusively that the complainant's point of view is radically unsound. He has offered no evidence which has any bearing upon the general level of passenger rates upon the roads of respondents. The rates upon these roads between Medina and Rochester unquestionably should be kept at the general level maintained elsewhere, no circumstance being shown which differentiates the Medina-Rochester service from ordinary service. The special circumstances upon which the complainant relies, and which have been hereinbefore fully enumerated, simply show that the respondents, to encourage special traffic, have made reduced or excursion rates. This is so usual, and so well understood are the principles upon which they are based, that no one has ever before urged to

this Commission that such special rates afforded any reason for reducing the general rate, and we believe no further discussion of this point would be profitable.

The sale of mileage books is too well established by law and custom and too much forced by public demand to justify a conclusion that all traffic can and should be handled upon mileage book rates. We do not think more need be said concerning the sale of mileage books by the electric road.

The reasons for the Rochester rate given by the Central from 1901 to 1908 appear too clearly in the record to require restatement. The existence of that rate under all the circumstances, coupled with nothing else, is altogether insufficient to show that a two cent a mile rate is excessive.

One further suggestion is pertinent. It sometimes results that the reduction of a rate so increases the density of traffic that the company finds the lower rate more profitable than the higher. A company may be fairly entitled to try the experiment of a lower rate for the purpose of determining its effect in this direction. If the result is not satisfactory, the fact of the experiment should not be taken as conclusive that the company should at all times and places charge only the lower rate.

The conclusion of the whole matter is that the rate from Medina to Rochester is the usual and accepted rate of the Central, is recognized and authorized by law, and no fact known to the Commission justifies a finding that it is excessive. The undisputed facts which are brought to our attention by the complainant show nothing directly as to the reasonableness of the Rochester rate. They do show that under special and peculiar circumstances the respondents charge less than the Rochester rate per mile. It is well settled that the charging of a lesser rate per mile under such circumstances is justifiable both upon legal and economical grounds, does not constitute a discrimination, nor even create a presumption that the general level of rates can be justly reduced to the lesser rate. Commutation rates run in

the neighborhood of three-fourths of a cent a mile, but no one would think of urging that merely because of their existence a railroad company offering them should be required to reduce all its passenger rates to the same level. On the contrary, every one recognizes that excursion and commutation service should and must be given at less rates than ordinary traffic.

If a rate of two cents a mile from Medina to Rochester is excessive, the same rate from Rochester to Syracuse is excessive. It can scarcely be expected that the whole passenger rate system of the respondents should be torn up in order to give the people of Medina a peculiar advantage, when the only real reason suggested therefor is that they are enjoying another.

The complaint should be dismissed.

In the Matter of the Complaint of HARRY FISHER AND OTHER RESIDENTS OF BUFFALO *against* INTERNATIONAL RAILWAY COMPANY as to service rendered the public on its so called Zoo and Kenmore-Tonawanda lines, and as to condition of the cars.

The question of the overcrowding of cars and of the headway upon which they are run should be determined, not by the consideration of individual cars, but by examination of the number of cars run in a reasonable period and the number of passengers who ride on those cars during that period. If during such period the headway has been reasonably maintained and sufficient cars furnished so that the average car during the period has not been overcrowded, the service can not be held to be inadequate.

Facts concerning the service rendered by the International Railway Company on the Zoo and Kenmore-Tonawanda lines stated.

Submitted May 19, 1911. Decided October 26, 1911.

Harry Fisher, in person, for the complainants.

Porter Norton, of Norton, Penney, Spring & Moore, for the defendant.

OLMSTED, *Commissioner*:

The complaint in the above proceeding is brought by Harry Fisher, alderman of the seventeenth ward in the city of Buffalo, and a large number of residents of that part of the city, who state that they are dependent upon the International Railway Company's street car service for transportation on the street cars of the company known as the Zoo and Kenmore-Tonawanda cars.

They complain that, whereas the Railway company claims to furnish a seven-minute service during certain hours of the day and a ten-minute service at other times in the day, as a matter of fact such service is not furnished, but that the service is extremely irregular and not to be depended upon, especially in the evening hours.

They also complain that some of the Kenmore-Zoo line cars on arriving at Main street and Florence avenue proceed north on Main street, and require the occupants of the cars to disembark and take another car in order to reach home by way of Florence avenue and Parkside avenue.

As a third cause of complaint, they state that the cars are old, provided with only one entrance, are maintained in a dirty and unsanitary condition, and are overcrowded so as to be a source of extreme discomfort and annoyance to passengers.

The powers of the Commission are invoked, to the end that complainants may be furnished an adequate and proper street car service.

The respondent answers, that it maintains a regular ten-minute service upon its line, except that during the "rush" hours, so called, in the morning and evening it furnishes a service varying at intervals from five to six minutes, and at night between the hours of 7:26 and 12:24 a service at intervals of fifteen minutes; and that the service is reasonably sufficient and proper to care for the needs of the residents and patrons of the line.

Respondent admits that on some occasions the car marked "Kenmore-Zoo" did proceed north on Main street to Hertel avenue instead of being operated upon the Main street and Zoo line, but that this was occasioned by temporary conditions in the abolition of a grade crossing on Parkside avenue, when respondent was compelled to operate its Kenmore cars by way of Main street and Hertel avenue by reason of orders given by the authorities of the City of Buffalo; that this condition of affairs no longer exists and that the cars are now operated by way of Florence avenue and Parkside avenue.

Respondent also denies that the service of the street cars is extremely irregular, and alleges that it is as good as can be maintained with the delays which occur on Main street over which the Zoo line operates. It also denies that the cars are maintained in a dirty and unsanitary condition, but admits that the cars have only one entrance.

Hearings upon the complaint were held in Buffalo on the 3rd day of February, 1911, and on the 19th of May, 1911. At the first hearing the complainants admitted that the temporary conditions requiring the Kenmore-Zoo cars to pass on beyond Florence avenue on Main street no longer existed, and that part of the complaint was withdrawn.

Evidence as to the unsanitary condition of the cars was given on the hearing held May 19th, and resolved itself into a complaint that the cars for the most part were poorly ventilated, causing great inconvenience to the riders therein.

The officials of the Railway company stated that if the ventilation had not been satisfactory, such condition was on account of disobedience to orders on the part of conductors whose duty it was to open the ventilators and keep the cars in proper condition both as to heat and to changes of air. It was agreed on the part of the Railway company that the matter of ventilation would be carefully taken up by the officials of the road, and the complainants were asked to report promptly to the superintendent any inconvenience that might be suffered by them hereafter through failure to open the ventilators or through any inattention in that regard given to requests made by passengers on the car. The orders in regard to ventilation seem to be sufficient, and if they are not carried out complaints addressed to the superintendent of the Railway company are proper. If when made they are not properly attended to by the superintendent, further appeal to this Commission can readily be had.

It did not appear from the testimony taken at the second hearing that any specific charges of uncleanness in the cars were sustained, but poor ventilation was clearly proved and was disposed of as above detailed.

The principal complaint is centered in the irregularity of the service, its insufficiency, and the crowded condition of the cars. The lines complained of leave the Terrace in the city of Buffalo, proceed northerly about 4½ miles upon Main street, turn westerly at Florence avenue to Parkside, to

Hertel, through Hertel to Virgil, to Kenmore, and on to Tonawanda.

The service particularly criticised by complainants is that given to residents of that portion of the seventeenth ward through which the lines pass: that is, between the turn off at Main street and Florence avenue and the turn off from Hertel to Virgil. The territory here situated is in a growing part of the city, and it was shown that a number of residences have recently been built in that section.

Hertel avenue extends across the city from east to west, and a street car line is now maintained by the respondent running from Main street westerly to Tonawanda street. This line is independent of the Kenmore-Zoo line, and is a shuttle service connecting the Main Street line of the east with the lines of the defendant on Tonawanda street in the western part of the city. The Kenmore-Zoo line uses the Hertel Avenue lines for a part of its route as has been above stated. The distance from the point where the Zoo cars run on to Hertel avenue at the corner of Parkside and Hertel to Main street is about one mile. The territory between the corner of Hertel and Parkside eastward to Main street is well built up in the eastern portion, and several houses have recently been added in the western portion, but it can not be called compactly built territory. On the north side of Hertel avenue there is a long stretch of vacant land practically covering the entire distance from Main street to Parkside avenue. Parkside avenue at its northern end is also very sparsely built up. The residents of this section in going to the business portions of the city must either use the Kenmore-Zoo cars or the Main Street cars. The Main Street service is frequent, and it became evident on the first hearing that if better facilities were furnished to the residents of this portion of the city to get to Main street a considerable number would avail themselves of that method of downtown travel. At the time of filing this complaint a fifteen-minute service was scheduled on Hertel avenue, but complainants stated that even this headway was not main-

tained. A proposition made by the Railway company was submitted at the first hearing, to increase this service by putting on more cars and making the headway ten minutes instead of fifteen minutes during the rush hours of the day, namely from 6 to 9 a. m. and from 4 to 8 p. m. This schedule went into operation on the 22nd day of May, 1911, and has been continued up to the present time.

On the hearing held May 19th Mr. Fisher stated that this schedule had met with the approval of everybody along the line and was working satisfactorily at that time, and that the traffic on Kenmore-Zoo line had been considerably relieved thereby. Since that time the Commission has learned that the ten-minute service has not been at all times maintained, due to temporary conditions in the changing of the track in the western part of the city; but it is stated that these conditions will soon be bettered, and as soon as the alterations are completed an inspector of the Commission will check the Hertel Avenue service to ascertain if it is kept at the ten-minute rush hour schedule agreed upon.

At the hearing February 3rd considerable evidence in the shape of counts made of passengers in the cars of the Kenmore and Zoo lines was submitted, both by the complainants and by the respondent. The figures were greatly at variance, and it appeared that they were taken by readings of the register made by petitioners and by estimates on the part of the respondent. It was agreed between the parties that an inspector of the Commission should make an actual count of the passengers traveling in the Zoo and Kenmore cars at Main street and Florence avenue, which was stated to be the point at which the peak of the load existed, both northbound and southbound. It was not thought necessary that this count should cover any hours except those agreed upon as rush hours, namely from 6 to 9 a. m. southbound, and from 4 to 7 p. m. northbound.

In accordance with this arrangement a count of passengers actually traveling, giving the No. of the car, the time at which it passed the corner of Main street and Florence

avenue, the headway, the number of fares registered, and the number of passengers actually on the car at the time it passed said corner was made on November 2, 3, and 4, 1910, and again on July 26, 27, and 28, 1911.

Below is given a table of the northbound and southbound cars for July 26, 1911. Similar tables have been made and are in the possession of the Commission for all the other days upon which the count was kept. The summary attached to the table shows the number of cars run, seating capacity of the cars, the passengers carried, the average passengers per car, and the average headway. The seating capacity of the cars run is for the most part forty each, but the total seating capacity is shown in the summary.

Northbound, 4 to 7 p. m., July 26, 1911:

Car No.	Time	Headway	Line	Fares registered	Count
832.....	4:04 p. m.	4 m.	Zoo	34	18
839.....	4:14 p. m.	10 m.	Zoo	43	26
847.....	4:22 p. m.	8 m.	K-T	23	17
831.....	4:38 p. m.	16 m.	Zoo	41	37
824.....	4:43 p. m.	5 m.	Zoo	31	11
804.....	4:57 p. m.	14 m.	K-T	38	31
818.....	5:05 p. m.	8 m.	Zoo	52	37
835.....	5:17 p. m.	12 m.	Zoo	60	46
846.....	5:26 p. m.	9 m.	K-T	66	51
832.....	5:34 p. m.	8 m.	Zoo	32	24
802.....	5:48 p. m.	14 m.	Zoo	85	52
839.....	5:52 p. m.	4 m.	Zoo	58	11
717.....	5:55 p. m.	3 m.	K-T	43	27
3018.....	6:03 p. m.	8 m.	Zoo	92	28
814.....	6:06 p. m.	3 m.	Zoo	86	40
831.....	6:11 p. m.	5 m.	Zoo	61	15
824.....	6:14 p. m.	3 m.	Zoo	96	49
841.....	6:23 p. m.	9 m.	Zoo	52	17
723.....	6:27 p. m.	4 m.	K-T	65	60
3040.....	6:32 p. m.	5 m.	Zoo	69	23
818.....	6:38 p. m.	6 m.	Zoo	64	38
825.....	6:43 p. m.	5 m.	Zoo	56	27
847.....	6:51 p. m.	8 m.	K-T	19	16

Summary:

	4 to 5 p. m.	5 to 6 p. m.	6 to 7 p. m.	4 to 7 p. m.
Number of cars run.....	6	7	10	23
Seating capacity.....	240	280	392	912
Passengers carried.....	140	248	313	701
Average passengers per car.....	23	35	31	30
Average headway.....	9.5 m.	8.3 m.	5.6 m.	7.4 m.

Southbound, July 26, 1911:

Car No.	Time	Headway	Line	Fares registered	Count
832.....	6:11 a. m.	11 m.	Zoo	14	12
839.....	6:21 a. m.	10 m.	Zoo	12	12
846.....	6:31 a. m.	10 m.	K-T	27	22
827.....	6:42 a. m.	11 m.	Zoo	19	19
824.....	6:54 a. m.	12 m.	Zoo	29	28
717.....	7:01 a. m.	7 m.	K-T	23	22
818.....	7:11 a. m.	10 m.	Zoo	16	16
841.....	7:23 a. m.	12 m.	Zoo	42	41
723.....	7:32 a. m.	9 m.	K-T	64	63
832.....	7:42 a. m.	10 m.	Zoo	42	39
839.....	7:52 a. m.	10 m.	Zoo	35	32
847.....	8:01 a. m.	9 m.	K-T	32	32
823.....	8:07 a. m.	6 m.	Zoo	13	13
831.....	8:11 a. m.	4 m.	Zoo	3	3
827.....	8:14 a. m.	3 m.	Zoo	16	16
824.....	8:24 a. m.	10 m.	Zoo	21	23
804.....	8:31 a. m.	7 m.	K-T	31	31
818.....	8:42 a. m.	11 m.	Zoo	11	9
841.....	8:53 a. m.	11 m.	Zoo	22	20
846*.....	9:02 a. m.	9 m.	K-T	15	13

Summary:

	6 to 7 a. m.	7 to 8 a. m.	8 to 9 a. m.	7 to 9 a. m.
Number of cars run.....	5	6	8	19
Seating capacity.....	200	240	320	760
Passengers carried.....	93	213	147	453
Average passengers per car.....	19	35	18	24
Average headway.....	10.8 m.	9.66 m.	7.62 m.	9.1 m.

* The last car at 9:02 a. m. is not included in these figures.

From the figures obtained on the counts detailed above a table has been prepared, showing the condition of the cars in twenty minute periods from 6 to 9 a. m. southbound, and from 4 to 7 p. m. northbound.

It is the opinion of the Commission that questions of the overcrowding of cars and of the headway upon which they are run should not be determined by the consideration of individual cars, but by examination of the number of cars run in a reasonable period and the number of passengers who ride on those cars during that period. For a service like the one under consideration here a period of twenty minutes has been thought reasonable. If during such period the headway has been reasonably maintained and sufficient cars furnished so that the average car in the period has not been overcrowded, the service can not be held to be inadequate.

Tables showing the result of the count as summarized in this way are given below for each day upon which the count was taken.

Southbound Summaries on a 20-minute Basis for July 26, 1911:

	6 to 6:20 a. m.	6:20 to 6:40 a. m.	6:40 to 7 a. m.	7 to 7:20 a. m.	7:20 to 7:40 a. m.
Number of cars run.....	1	2	2	2	2
Seating capacity.....	40	80	80	80	80
Passengers carried.....	12	34	47	38	104
Average passengers per car.....	12	17	24	19	52
Average headway.....	10 m.	10 m.	10 m.	10 m.	10 m.
	7:40 to 8 a. m.	8 to 8:20 a. m.	8:20 to 8:40 a. m.	8:40 to 9 a. m.	6 to 9 a. m.
Number of cars run.....	2	4	2	2	19
Seating capacity.....	80	160	80	80	760
Passengers carried.....	71	64	54	29	453
Average passengers per car.....	35	16	27	15	24
Average headway.....	10 m.	5 m.	10 m.	10 m.	9.1 m.

Northbound Summaries on a 20-minute Basis for July 26, 1911:

	4 to 4:20 p. m.	4:20 to 4:40 p. m.	4:40 to 5 p. m.	5 to 5:20 p. m.	5:20 to 5:40 p. m.
Number of cars run.....	2	2	2	2	2
Seating capacity.....	80	80	80	80	80
Passengers carried.....	44	54	42	83	75
Average passengers per car.....	22	27	21	41	37
Average headway.....	10 m.	10 m.	10 m.	10 m.	10 m.

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	5:40 to 6 p. m.	6 to 6:20 p. m.	6:20 to 6:40 p. m.	6:40 to 7 p. m.	4 to 7 p. m.
Number of cars run.....	3	4	4	2	23
Seating capacity.....	120	156	156	80	912
Passengers carried.....	90	132	138	43	701
Average passengers per car.....	30	33	34	22	30
Average headway.....	6.66 m.	5 m.	5 m.	10 m.	7.4 m.

July 27, 1911:

	4 to 4:20 p. m.	4:20 to 4:40 p. m.	4:40 to 5 p. m.	5 to 5:20 p. m.	5:20 to 5:40 p. m.
Number of cars run.....	2	2	2	2	2
Seating capacity.....	80	80	80	80	80
Passengers carried.....	48	61	64	73	105
Average passengers per car.....	24	30	32	36	52
Average headway.....	10 m.	10 m.	10 m.	10 m.	10 m.

	5:40 to 6 p. m.	6 to 6:20 p. m.	6:20 to 6:40 p. m.	6:40 to 7 p. m.	4 to 7 p. m.
Number of cars run.....	3	4	4	2	23
Seating capacity.....	120	156	160	80	916
Passengers carried.....	97	116	113	50	727
Average passengers per car.....	32	29	28	25	32
Average headway.....	6.66 m.	5 m.	5 m.	10 m.	7.5 m.

July 28, 1911:

	4 to 4:20 p. m.	4:20 to 4:40 p. m.	4:40 to 5 p. m.	5 to 5:20 p. m.	5:20 to 5:40 p. m.
Number of cars run.....	3	2	2	2	2
Seating capacity.....	120	80	80	80	80
Passengers carried.....	80	51	55	67	59
Average passengers per car.....	26	25	27	33	29
Average headway.....	6.66 m.	10 m.	10 m.	10 m.	10 m.

	5:40 to 6 p. m.	6 to 6:20 p. m.	6:20 to 6:40 p. m.	6:40 to 7 p. m.	4 to 7 p. m.
Number of cars run.....	3	4	4	2	24
Seating capacity.....	120	156	156	80	952
Passengers carried.....	93	113	141	51	710
Average passengers per car.....	34	28	35	25	30
Average headway.....	6.66 m.	5 m.	5 m.	10 m.	7.1 m.

Southbound Summaries on a 20-minute Basis for July 27, 1911:

	6 to 6:20 a. m.	6:20 to 6:40 a. m.	6:40 to 7 a. m.	7 to 7:20 a. m.	7:20 to 7:40 a. m.
Number of cars run.....	.	2	2	2	2
Seating capacity.....	40	80	80	80	80
Passengers carried.....	16	35	38	39	85
Average passengers per car.....	16	17	19	20	42
Average headway.....	10 m.	10 m.	10 m.	10 m.	10 m.
	7:40 to 8 a. m.	8 to 8:20 a. m.	8:20 to 8:40 a. m.	8:40 to 9 a. m.	6 to 9 a. m.
Number of cars run.....	3	3	2	2	19
Seating capacity.....	120	120	80	80	760
Passengers carried.....	82	52	51	40	438
Average passengers per car.....	27	17	26	20	23
Average headway.....	6.66 m.	6.66 m.	10 m.	10 m.	9 m.

July 28, 1911:

	6 to 6:20 a. m.	6:20 to 6:40 a. m.	6:40 to 7 a. m.	7 to 7:20 a. m.	7:20 to 7:40 a. m.
Number of cars run.....	1	2	2	2	2
Seating capacity.....	40	80	80	80	80
Passengers carried.....	14	31	38	33	87
Average passengers per car.....	14	15	19	16	44
Average headway.....	10 m.	10 m.	10 m.	10 m.	10 m.
	7:40 to 8 a. m.	8 to 8:20 a. m.	8:20 to 8:40 a. m.	8:40 to 9 a. m.	6 to 9 a. m.
Number of cars run.....	3	3	2	2	19
Seating capacity.....	120	120	80	80	760
Passengers carried.....	82	59	71	38	453
Average passengers per car.....	27	20	35	19	24
Average headway.....	6.66 m.	6.66 m.	10 m.	10 m.	9 m.

*Northbound Summaries on a 20-minute Basis for February 8, 9, and 10, 1911:**February 8, 1911:*

	4 to 4:20 p. m.	4:20 to 4:40 p. m.	4:40 to 5 p. m.	5 to 5:20 p. m.	5:20 to 5:40 p. m.
Number of cars run.....	2	2	2	2	2
Seating capacity.....	80	80	80	80	80
Passengers carried.....	40	36	54	47	95
Average passengers per car.....	20	18	27	24	47
Average headway.....	10 m.	10 m.	10 m.	10 m.	10 m.

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	5:40 to 6 p. m.	6 to 6:20 p. m.	6:20 to 6:40 p. m.	6:40 to 7 p. m.	4 to 7 p. m.
Number of cars run.....	3	4	4	2	23
Seating capacity.....	120	160	160	80	920
Passengers carried.....	104	117	137	45	675
Average passengers per car.....	34	29	34	23	29
Average headway.....	6.66 m.	5 m.	5 m.	10 m.	7 m.

February 9, 1911:

	4 to 4:20 p. m.	4:20 to 4:40 p. m.	4:40 to 5 p. m.	5 to 5:20 p. m.	5:20 to 5:40 p. m.
Number of cars run.....	2	2	2	2	2
Seating capacity.....	80	80	80	80	80
Passengers carried.....	34	51	39	50	101
Average passengers per car.....	17	26	20	25	50
Average headway.....	10 m.	10 m.	10 m.	10 m.	10 m.

	5:40 to 6 p. m.	6 to 6:20 p. m.	6:20 to 6:40 p. m.	6:40 to 7 p. m.	4 to 7 p. m.
Number of cars run.....	3	4	3	3	23
Seating capacity.....	120	160	120	120	920
Passengers carried.....	124	123	123	102	749
Average passengers per car.....	41	31	41	34	32
Average headway.....	6.66 m.	5 m.	6.66 m.	6.66 m.	7.6 m.

February 10, 1911:

	4 to 4:20 p. m.	4:20 to 4:40 p. m.	4:40 to 5 p. m.	5 to 5:20 p. m.	5:20 to 5:40 p. m.
Number of cars run.....	2	2	2	2	2
Seating capacity.....	80	80	80	80	80
Passengers carried.....	23	33	71	52	128
Average passengers per car.....	12	16	35	26	64
Average headway.....	10 m.	10 m.	10 m.	10 m.	10 m.

	5:40 to 6 p. m.	6 to 6:20 p. m.	6:20 to 6:40 p. m.	6:40 to 7 p. m.	4 to 7 p. m.
Number of cars run.....	3	3	5	2	23
Seating capacity.....	120	120	196	80	916
Passengers carried.....	127	77	166	46	723
Average passengers per car.....	42	26	33	23	31
Average headway.....	6.66 m.	6.66 m.	4 m.	10 m.	7.5 m.

Southbound Summaries on a 20-minute Basis for February 8, 1911:

	6 to 6:20 a. m.	6:20 to 6:40 a. m.	6:40 to 7 a. m.	7 to 7:20 a. m.	7:20 to 7:40 a. m.
Number of cars run.....	1	2	2	2	2
Seating capacity.....	40	80	80	80	80
Passengers carried.....	13	33	27	42	93
Average passengers per car.....	13	16	13	21	46
Average headway.....	10 m.	10 m.	10 m.	10 m.	10 m.

	7:40 to 8 a. m.	8 to 8:20 a. m.	8:20 to 8:40 a. m.	8:40 to 9 a. m.	6 to 9 a. m.
Number of cars run.....	3	3	2	2	19
Seating capacity.....	120	120	80	80	760
Passengers carried.....	101	113	79	40	541
Average passengers per car.....	34	38	40	20	28
Average headway.....	6.66 m.	6.66 m.	10 m.	10 m.	9 m.

February 9, 1911:

	6 to 6:20 a. m.	6:20 to 6:40 a. m.	6:40 to 7 a. m.	7 to 7:20 a. m.	7:20 to 7:40 a. m.
Number of cars run.....	1	2	2	2	2
Seating capacity.....	40	80	80	80	80
Passengers carried.....	14	33	25	49	92
Average passengers per car.....	14	16	12	25	46
Average headway.....	10 m.	10 m.	10 m.	10 m.	10 m.

	7:40 to 8 a. m.	8 to 8:20 a. m.	8:20 to 8:40 a. m.	8:40 to 9 a. m.	6 to 9 a. m.
Number of cars run.....	3	3	2	3	20
Seating capacity.....	120	120	80	120	800
Passengers carried.....	105	113	83	58	572
Average passengers per car.....	35	37	42	19	28
Average headway.....	6.66 m.	6.66 m.	10 m.	6.66 m.	9 m.

February 10, 1911:

	6 to 6:20 a. m.	6:20 to 6:40 a. m.	6:40 to 7 a. m.	7 to 7:20 a. m.	7:20 to 7:40 a. m.
Number of cars run.....	1	2	2	2	2
Seating capacity.....	40	80	80	80	80
Passengers carried.....	12	29	29	51	98
Average passengers per car.....	12	15	15	30	49
Average headway.....	10 m.	10 m.	10 m.	10 m.	10 m.

	7:40 to 8 a. m.	8 to 8:20 a. m.	8:20 to 8:40 a. m.	8:40 to 9 a. m.	6 to 9 a. m.
Number of cars run.....	2	4	2	2	19
Seating capacity.....	80	156	80	80	756
Passengers carried.....	93	121	81	49	563
Average passengers per car.....	46	30	40	25	30
Average headway.....	10 m.	5 m.	10 m.	10 m.	9 m.

From a study of the foregoing tables it will appear that at two periods only in the day, namely from 7:20 to 8 a. m. and from 5:20 to 5:40 p. m. (time being given for Florence avenue and Main street), has there been anything like serious overcrowding of the cars; in fact, in all but one or two individual instances outside of these periods there have been more seats than there were passengers, as is shown by a comparison of the lines in the summary showing seating capacity in each period and the lines showing passengers carried during the same period.

Since the counts were made this matter has been brought to the attention of the respondent, and the following letter has been received by the Commission:

BUFFALO, October 10, 1911.

HON. JOHN B. OLMSTED, *Commissioner,*
Public Service Commission, Second District,
Albany, New York.

DEAR SIR:

In accordance with your request, I beg to advise that two additional "trippers" have been put in service on the Main-Zoo line, one in the morning and one in the evening: the morning "tripper" leaving Park-side avenue and the "Belt Line," southbound, at 7:44 o'clock, and the evening "tripper" leaving the Terrace, northbound, at 5:05 o'clock.

Trusting that this is satisfactory, I am,

Yours respectfully,
 (Signed) T. W. WILSON,
General Manager.

This increase in service ought materially to relieve the traffic at the hours in the morning and evening when it is at its height as shown by the tables, as it will give one more car in each of these periods.

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The respondent having since the institution of this proceeding —

1. Installed a ten-minute service during the rush hours on Hertel avenue;

2. Issued special orders as to ventilation of cars on the Kenmore-Zoo line;

3. Put on one additional car on the Main-Zoo line during the morning rush hours and one additional car during the evening rush hours;

the Commission is of the opinion that no further relief is necessary under present conditions, and the case is closed upon the records; with permission to reopen the same should either of the foregoing additions to service be discontinued or the orders as to ventilation of cars prove ineffective in operation.

An order closing the case under the above conditions will be entered accordingly.

In the Matter of the Application of the POSTAL TELEGRAPH-CABLE COMPANY for an order restraining the Western Union Telegraph Company from discriminating against the petitioner in the matter of rates.

A charge made by the Western Union Telegraph Company to the Postal Telegraph-Cable Company for the originating address and date upon a telegram transferred by the latter to the former company in the course of transmission is unreasonable and discriminatory.

Decided November 8, 1911.

William W. Cook for Postal Telegraph-Cable Company.
Rush Taggart for Western Union Telegraph Company.

STEVENS, *Chairman*.

This is an application by the Postal Telegraph-Cable Company, a domestic telegraph corporation carrying on a telegraph business in the State of New York, for an order which shall in effect restrain the Western Union Telegraph Company, which is also a domestic telegraph corporation, from exacting a charge from the Postal company for the originating address and date upon a telegram transferred by the Postal to the Western Union; also for a further order prohibiting the Western Union company from sending to the Postal company's patrons certain statements or notices which are claimed by the Postal company as being unjust and unreasonable practices, in violation of section 97 of the Public Service Commissions Law. The two questions are entirely distinct and must be treated separately.

Statement of facts:

The Postal company has 137 offices and the Western Union has 1531 offices for the transaction of business in this State. When a patron of the Postal company hands in at one of the offices of that company in this State a telegram directed to a point in this State at which the Postal company has no office, the Postal company transmits that message

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as far as it can on its own lines, and then to cover the balance of the distance it delivers the message by telephone, if possible, and if that course is not possible the Postal company writes out the message and hands it over to the Western Union company at such intermediate point for further transmission by the Western Union and delivery by that company to the addressee at the point of destination. Such a message is herein called a transferred message.

The Western Union accepts such transferred messages for transmission and delivery and charges the Postal therefor its ordinary local rate for the transmission of a message from the point of transfer to the point of destination plus an additional charge for the name of the originating point and the date. The name of the originating point and the date usually constitute, under the rules in force for counting words, four or five words. The Western Union when receiving such transferred message also adds certain words, four or five in number, to the message for its own convenience and purposes, but it makes no charge for these added words.

The usual rule in charging for the transmission of telegrams when delivered to the company which transmits the entire distance and makes the delivery, is not to charge for the name of the originating point, the date, the address, and the signature. The ordinary charge is based wholly upon the number of words contained in the body of the message.

The Postal company claims that the charge upon transferred messages for the name of the originating point and the date is unjust, unreasonable, and discriminatory.

The Western Union claims that the practice is reasonable and not discriminatory, and that it has followed this practice for many years without question. Its rule upon this point is No. 8 in its book of rules, and reads as follows:

Extra dates: Whenever a message which has come over the line of any other telegraph company is offered at a place not indicated by the tariff book of this company as the proper place for such message to reach Western Union lines; or whenever a message is received at any office by mail to be forwarded by telegraph; or in case a person having

received a message requests the same to be forwarded to another place; or if a person leave town before the arrival of an expected message and it be forwarded to him: under each of these circumstances the name of the place where the message originated and the date will be counted and charged for as a part of the message.

It is undisputed that the Postal company had the same rule in force and effect for many years up to about August or September, 1910, at which time it changed its rule, which it also numbered Rule 8, so as to read as follows:

Whenever a telegram is received at any office by mail to be forwarded by telegraph; or in case a person having received a telegram requests the same to be forwarded to another place; or if a person leave town before the arrival of an expected telegram and it be forwarded to him: in each of these instances the name of the place where the telegram originated and the date will be counted and charged for as part of the telegram.

The difference in the two rules consists in the omission of the following words contained in the Western Union's rule:

"Whenever a message which has come over the line of any other telegraph company is offered at a place not indicated by the tariff book of this company as the proper place for such message to reach Western Union lines."

Rule 3 of both companies clearly designates the words which are to be counted and charged for in sending telegrams. The material parts of the Western Union rule are as follows:

"In a prepaid message the under mentioned words will be counted and charged for, viz.:

"All words in an extra date (see Rule 8);

"All extra words in an address;

"All words, figures and letters as per Rule 4 in the body of a message;

"All signatures when there are more than one, except the last;

"All words after the last or the only signature."

The Postal rule is precisely the same in effect, although there is slight variation in the language.

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The foregoing rule states the matters for which the Western Union does charge in the transmission and delivery of a telegram. It does *not* charge for the following matters in the cases specified:

1. Original messages:

- (a) Name of originating point and date;
- (b) Address;
- (c) Signature;
- (d) Added words placed on the telegram for its own convenience.

2. Transferred messages:

- (a) Name of originating point and date on transferred messages originating at non-competitive points;
- (b) Name of originating point and date on messages transmitted to it by telephone;
- (c) Name of originating point and date on messages transferred to it from cable companies;
- (d) Name of originating point and date on messages transferred to it by the Great Northwestern Telegraph Company, a subsidiary corporation.

From the foregoing statement it will be seen that the Western Union makes a charge for the name of the originating point and the date in the case of transferred telegrams only when such telegrams originate at a point where the Western Union has a competing office.

Conclusions from above facts:

The following conclusions are to be drawn from the foregoing facts:

1. The rate scheme of both companies has been constructed on the basis that the proper charge for the transmission and delivery of the message, where one company both receives and delivers, is ascertained by the number of words in the message.

2. The fact that the Western Union does not charge for the name of the originating point and date on transferred

messages originating at non-competitive points shows that it does not make the charge for these matters on transferred messages originating at competitive points in order to compensate itself for the expense of transmitting the name of the originating point and the date.

3. The Western Union does not, in the case of a transferred message, transmit any more words than it would in the case of a message originating at the point of transfer. In other words, a message originating at the point of transfer would contain the name of the originating point and the date and this would be transmitted free. The transferred message contains the name of the originating point and date, but is not transmitted free in case the originating point is competitive.

4. The Western Union, receiving a transferred message, does add certain words to it, four or five in number, but it makes no charge whatever for these words. To all messages both companies add certain words for their own convenience in counting and otherwise, but for such added words neither makes any charge. The words added by the Western Union to a transferred message, although four or five in number, need not for any practical purpose be more than two, while the name of the originating point and date always consist of four words and sometimes of five.

5. The Western Union, by this method of charging for the name of the originating point and the date of transferred messages, necessarily receives more for its services than it would in the case of the message originating with it at the transfer point.

It also appears undisputedly that in many cases the Western Union receives more for the transferred message under this system of charging than it would had the message been delivered to it at the originating point and transmitted by it the entire distance to the addressee. A list of some sixteen instances of actual occurrences of this kind has been furnished by the complainant.

The respondent, the Western Union, does charge for the name of the originating point and date upon transferred

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messages originating at competitive points. It does not charge for these matters upon messages originating at non-competitive points, and upon messages delivered to it by telephone.

It is not possible to assign any reason for this distinction except the desire of the Western Union to suppress competition at competitive points. The Postal assigns reasons why it desires to conduct its business at competitive points, with the use of transferred telegrams, which are entirely satisfactory and legitimate from its point of view; it is obviously to the advantage of the Western Union, as is shown by the charge which it makes and by the printed matter which it sends out, to suppress so far as possible the competition of the Postal at these points.

The only question which the facts and the necessary conclusions therefrom seem to leave open to be determined by the Commission is whether it is legitimate and reasonable for the Western Union to make this charge for the name of the originating point and the date, because a telegram originates at a competitive point. Its own practice determines that in other cases it is not reasonable, and it seems to us that this practice determines the whole matter. Clearly, a public service corporation must extend precisely the same facilities to a competitor as it does to the entire world. It can make no distinction between those offering it business. It must charge them alike and serve them alike. If it is its practice to serve the immense majority of its business without a charge for the name of the originating point and the date, and it obtain its compensation for the service in fixing the rate for the words in the body of the message at such an amount as will afford it a proper remuneration for transmitting all the message contains, that rule must obtain the same with competitors as with ordinary individuals. No satisfactory reason has been offered in support of the rule. The shifting of ground by the respondent during the progress of the case, which it has not been thought necessary to detail, shows that it really had no reason for the practice except the

desire to suppress competition. It now expressly repudiates what it first admitted, that the charge is for the extra words which it adds to the message for its own convenience and purposes. The charge is a departure from its general and settled scale and as such must have a satisfactory reason for its existence. The burden is upon the respondent to justify the exception. It has failed so to do.

Forwarded messages:

Both companies make a charge for the name of the originating point and the date, in case of forwarded messages. The complainant urges that there is a difference between a transferred message and a forwarded message which justifies the discrimination. The respondent urges that there is no difference between the two, and that if the charge is proper in one case, it is proper in the other; that the practice of the complainant in charging for these matters in the case of forwarded messages is sufficient justification for the practice of the respondent in the case of transferred messages.

If the practice of the complainant in charging for the name of the originating point and the date in the case of forwarded messages is wrong, it affords no justification to the respondent for its practice which is complained of. If the practice of the respondent in the matter complained of is right, the practice with regard to forwarded messages does not aid in reaching a proper determination. The defect in the reasoning of the respondent about forwarded messages is in assuming that the charge is proper. We do not pass upon that point, since there is no complaint before us; the only matter which we undertake to determine is that the practice of the complainant in this regard can not and does not determine the question under consideration.

Past practice of the complainant:

Nor does the former practice of the complainant in making the charge of which it now complains afford any answer to this complaint. No estoppel is created; and if the practice is wrong, the complainant is to be commended for abandon-

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ing it. If it is right, the practice of the complainant is of no consequence.

It appears from the foregoing considerations that the practice complained of is unreasonable, discriminatory, and that an order proper and effectual to prevent its continuance should be entered.

The circular complained of:

The complainant also complains of the circular issued by the Western Union to its employées, which circular became effective April 1, 1908. It is unnecessary to set out this circular in full, or to say more concerning it than that the Commission finds nothing in its terms which justifies its interference.

In the Matter of the Complaint of J. HERON CROSMAN
against THE NEW YORK, NEW HAVEN AND HARTFORD
RAILROAD COMPANY.

1. Mistakes or denials of proper opportunities for passengers to provide themselves with necessary tickets may constitute just grounds for refunding, but in the general sense, and as applied to the traveling public as a whole, in which respect only can the subject be considered, there is nothing unfair or unreasonable in a railroad regulation which requires a passenger to present a ticket or pay the regular fare in cash at the time of riding without the subsequent refund of any part of the regular fare so paid.

2. A commutation ticket holder having left his commutation ticket at home, paid the regular fare and took the conductor's receipt, and afterward applied to the company for a refund of the regular fare so paid, presenting his commutation ticket at the same time for cancellation of a coupon covering the ride. To prevent possible unjust discrimination and protect itself the company would have to verify the passenger's statement by clerical examination of conductors' turned-in coupons to ascertain whether or not the commutation ticket had been used on the train in question, or another train running about the same time. The expense of such examination is disproportionate to the amount involved, and to require such examination would be unreasonable. A rule is stated on the commutation ticket that no refund of regular fare paid will be made in case of non-presentation of the ticket.

Complaint that such a rule is unreasonable and unjust *held* not sustained.

Submitted November 8, 1911. Decided December 6, 1911.

J. Heron Crosman, for complainant.

Charles M. Sheafe, jr., for respondent.

DECKER, *Commissioner*:

Complainant is a commuter between New Rochelle and New York city by the New York, New Haven and Hartford railroad. At times he has left his commutation ticket at home and, having paid a cash fare to the train conductor and taken his receipt, the railroad company on subsequent presentation at a ticket office of the cash fare receipt and the

commutation book refuses to refund the cash fare paid and punch the commutation book. The commutation book contains a contract which is accepted by the user at the time of purchase. This contract provides that "In consideration of the reduced fare at which this ticket is sold, it is issued by The New York, New Haven and Hartford Railroad Company subject to the following conditions." Here follow ten numbered conditions. Condition number five, so far as pertinent here, reads:

5. That this ticket shall be presented and a coupon detached by conductor at time of passage, for each ride taken hereon, and that if ticket is not so presented, regular fare shall be collected, which shall not be refunded. . . .

This condition is also set forth in the company's published tariff governing the sale of commutation tickets.

The company having so established its tariff and sale conditions governing commutation tickets must adhere in practice thereto, so long as they are in force. The question here is whether the rule is unreasonable and unjust and ought to be modified or forbidden.

This complainant, acting doubtless in each instance in absolute good faith, feels that the rule is harsh and unnecessary, and that when he presents a receipt showing payment of a cash fare on a certain date and asks for the refund thereof because he was at the time of payment a regular commuter holding a commutation ticket but which he omitted to have with him at the time of riding, presenting at the same time the commutation ticket for cancellation of the coupon covering the ride, the company ought in fairness and as a reasonable courtesy to a steady patron to comply with the request. Considering only his own case, every other commuter in the same situation and acting in good faith would naturally hold the same view.

A railroad company, however, must fix its regulations with reference to each branch of its passenger business as a whole, without regard to any of its patrons as individuals, and to

the end that it may deal with the public by methods which are expeditious and practicable. Moreover, it must not establish practices which open the door to unlawful discriminations. These commutation books contain sixty coupons good in either direction. They are numbered but not dated. Only the commencing and expiring dates are shown, and the coupons are good for use at any time during the month for which the ticket book is issued. The holder may ride as often as he chooses upon the ticket book during the month or during a single day. An application for refund such as complainant contemplates involves verification of the necessary statement that upon a particular train on a stated day the cash fare was paid and the ticket was not used on that train or another train run about the same time, and this must be done by searching through the hundreds of coupons turned in by the conductor of the commuters' train. If a coupon from the commutation book is found to have been turned in by the conductor signing the cash fare receipt or the conductor of another train run about the same time on that day, it is evidence not only that the application for refund is fraudulent but that it is sought to use the commutation book to cover the ride of some other person. A refund in such a case would constitute unjust discrimination forbidden by law.

The clerical time involved in verifying the application in order to cover the forgetfulness of the commuter resulting in nonproduction of the ticket at the time of passage is obviously too great and unreasonable to require. Such clerical time would probably cost the company more than the one-way fare. Particularly is this so, if the rule were to be abolished or modified as complainant desires, and the applications for refund of cash fares paid by conductors were made in considerable number, as might well be anticipated. The commuting service would then bear the additional operating charge caused by employment of labor for such verification purposes.

It is the general custom and reasonable practice of railway companies to require of passengers a ticket or cash fare, and in the absence of a ticket the cash fare collected is not refunded on any ground. Upon no other basis could the great number of fare collections be conducted without adding substantially and unnecessarily to the cost of operation, and thus tending to increase the fares paid for passenger transportation. In this State railroad companies are permitted to collect excess cash fares in certain cases, and these excess cash fares must be refunded upon presentation of the cash fare receipt, but this does not apply to retention by the company of the regular fare which is drawn in question. Occasions arise where, through mistakes of agents or unjust regulations as to the time of opening ticket offices for selling tickets and from other causes, opportunities to provide themselves with necessary tickets are denied to passengers, and such occasions constitute just grounds for a refund. Round-trip tickets used but one way are redeemed on the basis of one-way fares. But in the general sense, and as applied to the traveling public as a whole, in which respect only can the subject be considered, there is nothing unfair or unreasonable in a railroad regulation which requires a passenger to present a ticket or pay the regular fare in cash at the time of riding without the subsequent refund of any part of the regular fare so paid.

The complaint is not sustained and must be dismissed.

In the Matter of the Application of the HUDSON RIVER AND EASTERN TRACTION COMPANY for authorization to issue stock to the amount of \$50,000 and bonds to the amount of \$850,000.

Re-statement of Commission's position that for the protection of bondholders a reasonable proportion of stock should be issued to cover cost of construction and that the entire cost of construction should not be met by sale of bonds.

In this case bonds are authorized to full amount of estimated cost of construction of an extension of applicant's road from Ossining to White Plains. The opinion condemns such practice and states why the Commission feels itself compelled to grant the application although disapproving the principle involved.

Decided December 27, 1911.

F. A. Stratton for applicant.

BY THE COMMISSION:

In its petition the Hudson River and Eastern Traction Company asks for an authorization under section 55 of the Public Service Commissions Law to issue stock and bonds for several distinct purposes, which will be separately considered.

Stock Authorization:

It asks authorization to issue its common capital stock to the amount of \$50,000 to F. A. Stratton, in full settlement of certain claims which he has against said company for services rendered in the promotion of the enterprise and in procuring the franchises and rights of way. No sufficient proof has been submitted showing the extent of the services rendered or their value. From informal conversation with Mr. Stratton it appears that he is fairly entitled to something from the company for services which he has rendered, but apparently not to any such amount as is asked for. The proper disposition of this matter therefore is to

deny the application at this time, with leave to renew upon the same papers whenever the company is prepared to submit proof concerning the extent and value of the services of Mr. Stratton.

Bond Issue:

The applicant asks for an authorization to issue bonds to the amount of \$850,000 for three distinct purposes:

1. To pay for the cost of completing the construction and equipment of its railroad. This refers to the extension of the road from its present terminus at Camp Woods near Ossining to the village of White Plains. The expense of this extension as estimated in the application is the sum of \$621,000.

2. To pay for the cost of the branch of its road on Spring street in the village of Ossining, which expense is stated in the petition as approximately \$25,000.

3. To pay a deficit of \$24,963.60 which has resulted from the operation of petitioner's road during the past three years, and also to pay a judgment for \$8000 with costs and interest, making the total deficit \$34,000.

The sum of these three items is \$680,000, which is 80 per cent of \$850,000 the total amount of bonds asked for.

Spring Street Extension and Other Improvements:

A careful audit of the books of the company and an examination by an engineer of the Commission, as well as other proof, discloses that the company is indebted in the sum of \$36,000, evidenced by bills payable, which indebtedness was incurred in the construction of an extension of its road in the village of Ossining, along Spring street, and in the construction of other capitalizable improvements in said village. The Spring Street extension cost the sum of \$25,860.95, and the other improvements the sum of \$10,139.05, making a total indebtedness now outstanding of \$36,000 incurred in additions and betterments to its property, which it should be allowed to capitalize in some form.

Deficit:

The company's balance sheet, prepared as of May 31, 1911, shows the following:

Taxes accrued	\$32.01
Interest accrued on bills payable	2,000.05
Interest accrued on funded debt	14,175.00
Bills payable	69,553.56
Accounts payable	10,700.39
Total	\$96,461.01

The indebtedness for the Spring Street extension and other improvements hereinbefore detailed is included in this indebtedness. Deducting the same therefrom leaves a deficit to the company of about \$60,000, which includes the \$34,000 mentioned in the original petition. This Commission has been unwilling to allow either stock or bonds to be issued for this deficit under all of the circumstances of the case, which need not be further detailed at this point. The company, on the 18th day of December, 1911, filed with the Commission a supplemental petition, which contains the following, among other things:

That your petitioner hereby waives its right to have any of said first mortgage bonds issued to it in capitalization of the indebtedness which has arisen from the inability of your petitioner to pay its operating expenses, taxes, and fixed charges out of its operating revenues, but renews its prayer for permission and consent to the issue of stocks and bonds in all other respects.

The balance sheet accompanying said petition shows a deficit of \$39,098.89 as of October 31, 1911. The application for bonds on account of this deficit having been withdrawn by this supplemental petition, no further consideration need be given thereto at this time.

New Construction:

In the supplemental petition before referred to, the petitioner files new schedules of the estimated expense of constructing its road from Camp Woods to White Plains. Schedule A is the estimated cost of completing the construction and equipment from the present terminus at Camp

Woods to the village of Hillside, formerly the village of Sherman Park, and the total amount of the item is \$223,675. This total includes an item of \$6000 for working capital. This estimate, as well as the preceding one filed, has been made the subject of proof and examination, and with the exception of the item of \$6000 for working capital which the Commission deems to be unnecessary, the estimate is approved, thus making the estimated expense of this portion of the construction \$217,675.

Exhibit B is the estimated cost of construction and equipment of the extension from the village of Hillside to and into the village of White Plains. The aggregate of the items is \$399,696, which includes an item of working capital of \$9000. The item for working capital is disapproved, and this being deducted from the total leaves the sum of \$390,696 as the estimated cost of this portion of the extension. Both estimates for working capital are deemed excessive, and it is believed that the estimates for other matters are large enough to provide for such matters and leave a surplus sufficient to furnish needed working capital. A transfer of a proper amount to working capital can be authorized in due time.

The aggregate of the items hereinbefore allowed is \$644,371. The applicant desires these matters to be taken care of by an issue of bonds to be sold at 80 per cent of their par value. This would require a bond issue amounting to \$806,000.

The sole remaining question for consideration is whether all of these matters shall be capitalized by an issue of bonds to the amount of \$806,000. In this connection it should be stated that the existing capitalization of the company is

Stock	\$84,000
Bonds	75,000
Total	\$159,000

Stock to the amount of \$9000 appears to have been issued for cash to an equal amount, as was required by the

Railroad Law, upon the incorporation of the company. The remaining \$75,000 of stock, together with bonds to the amount of \$75,000, were issued for the construction of the main line of the road from the railroad station in the village of Ossining to Camp Woods, a distance which the company reports to be 1.8 miles. In its report to this Commission the company reports the cost of this portion of its road June 30, 1908, as \$172,379.97, which is \$22,379.97 in excess of the amount of bonds and stock issued therefor. This aggregate, of course, is reached by adding to the amount of bonds and stock issued any other expense incurred. The alleged total cost, therefore, of this road is \$95,766 per mile. The Spring Street extension, a length of 0.89 mile, is shown to have cost the sum of \$25,860.95, which is at the rate of \$29,000 per mile. Without further analysis of the figures, it seems to be reasonably apparent that the stock to the amount of \$75,000 was practically issued as a bonus with the bonds, with the proceeds of which the main line was constructed. There is, therefore, no substantial equity in this property represented by cash paid in for stock except the amount of \$9000.

Should Bonds be Issued in this Case to the Amount of \$806,000?

In its opinion in the case of the application of the *Rochester Corning Elmira Traction Company*, 1 P. S. C. 166, at page 179 this Commission says:

A second and exceedingly important question presents itself: how this capitalization should be divided between stock and bonds. Such division should be made upon principles easy of comprehension, just in their application and productive of good results in the actual conduct and operations of the corporation. It is apparent that when we have fixed the amount which should be permitted in bonds, we have necessarily fixed the amount which should be allowed for stock, and it is well, therefore, to inquire whether we may not determine the division between the two by an inquiry into the permissible amount of the bond issue. It is believed that it would be of incalculable value to the successful development of corporate enterprises if there could be reasonable certainty they would take care of the fixed charges entailed by bond

issues. Certainty of the payment of interest with practical certainty of payment of principal can not be overestimated as to their value in forwarding such enterprises. It would seem to be essential in order to give credit to any bond issue, that there should be an amount of actual money invested by the stockholders in the enterprise sufficient to afford a moral guaranty that in the judgment of competent business men it is likely to prove commercially successful and that men of judgment and experience are willing to invest their capital in it with no assurance of returns upon that capital except those coming from the legitimate profits which may reasonably be anticipated. It would also seem essential in the present state of development of railroad enterprises, that any scheme which would receive the attention of capitalists should present features making it fairly certain that the road will pay its operating expenses, its taxes, and its proper depreciation charges, and leave a surplus above them for the payment of fixed charges.

We also state in the same opinion, at page 187 —

We conceive that we should not permit an issue of bonds beyond an amount upon which, in our judgment, the enterprise will be able to pay interest. While this Commission can not in any respect be responsible any more morally than it is legally for returns upon bond issues which it authorizes, it would certainly be derelict in its duty to the public if it permitted a bond issue upon which it was not fairly reasonable to expect that the interest would be paid from the legitimate earnings of the enterprise. It must be clearly understood that in arriving at conclusions upon so important and delicate a point the Commission can not arrive at results satisfactory to itself and to the public except upon a conservative basis, and it would be in the highest degree reprehensible for the Commission to permit any corporation to offer bonds upon the market which the Commission, in the exercise of its best judgment and with full command of all the statistical data regarding the operation of roads within this State, did not feel to have a reasonably satisfactory assurance from all the circumstances of the case that the interest would not be defaulted.

To the opinion thus expressed this Commission still adheres without the slightest abatement in any respect, except that decisions of the courts made since the opinion was written and since the opinion was promulgated have placed in more than doubt the power of the Commission to determine whether capitalization should be by stock or bonds alone or a division of the same between the two, against an express determination of the corporation itself.

If the Commission clearly and unequivocally possesses the power which it then supposed it had, it would exercise the same in this and every other case in accordance with the principles above enunciated.

In its Fourth Annual Report to the Legislature for the year 1910, at page 132, this Commission says:

Excessive Proportion of Bond Issues to Stock Issues: Owing to various conditions which can not be adequately discussed within a brief compass, there is a very strong tendency upon the part of corporations to make the proportion of bond issues excessive. As is well known to all who have investigated the subject, such tendency is exceedingly dangerous and should be repressed wherever and whenever possible. It is not possible for the Commission in all cases to obtain what it conceives to be the proper results in this class of cases.

In this language the Commission guardedly alluded to the effect of the construction which has been put by the courts upon the Public Service Commissions Law. The entire paragraph itself was designed to be and is a reiteration of the same views as those expressed in the Rochester Corning Elmira case above quoted. It is interesting, as well as instructive, to note certain language contained in a very recent report of the Railroad Securities Commission to the President. This very able report contains a paragraph entitled "Financial Dangers". [See page 21.] In this paragraph the undue increase of fixed charges is plainly condemned and its effects pointed out.

We are in this case confronted by the unequivocal and unmodified statement of those representing the applicant that the construction of its proposed extension is wholly dependent upon authorization to issue bonds for the amounts needed; that stock will not be subscribed for the same; and therefore if authority to issue the bonds is denied the enterprise must fail. The applicant insists upon issuing bonds for the entire amount. We are thus also confronted with the question whether for a needed purpose this Commission has power to require that stock as well as bonds shall be issued, or all stock, when the corporation itself insists upon issuing bonds alone. If it were clear under the Public

Service Commissions Law, as interpreted by the courts, that we had power to require a proper proportion of stock in this case, that power would be unhesitatingly used, provided the facts showed that an additional issue of \$806,000 of bonds supported by a stock issue of \$84,000, of which in our judgment \$75,000 was bonus stock, was inconsistent with the principles laid down in the Rochester Corning Elmira case.

The applicant has submitted figures by which it attempts to justify a total of bonds issued upon this road of \$876,000. They are, in brief, that the total earnings of the road will be, upon a basis submitted by it, the sum of \$166,805 per year. At an operating ratio of 65, which it considers reasonable, the operating expense would be \$108,423, leaving a gross income of \$58,382. \$876,000 of bonds at 5 per cent interest involve an annual fixed charge of \$43,750. Deducting this from the gross income, \$58,382, there would be an excess of \$14,632 above fixed charges to take care of depreciation, pay dividends, or anything else to which it might be properly applicable.

The question presented by this calculation is whether or not the operating revenues would be equal to \$166,805 per year. The road is substantially 16 miles long, and it is the scheme of the company as submitted to us to divide it into four zones, the fare for each zone to be five cents, or twenty cents for a ride the full length of the road. The calculations submitted by the company upon this basis show that the annual gross earnings per mile must be \$10,425. This is naturally to be compared with the earnings of other interurban roads. The following are some of the earnings per mile of other interurban roads reporting to this Commission for the year ended June 30, 1910:

<i>Name</i>	<i>Length</i>	<i>Earnings</i>
Warren & Jamestown.....	21 miles	\$4,248
Waverly, Sayre & Athens..... (about)	12 "	6,516
Geneva & Auburn	15 "	6,225
Chautauqua Traction	25 "	6,222
Albany Southern	30 "	6,829
Otsago & Herkimer.....	63 "	6,622

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P. S. C., 2d D.

<i>Names</i>	<i>Length</i>	<i>Earnings</i>
Elmira, Corning & Waverly.....	8.89 miles	\$4,491
Western New York & Penna. Traction.....	92 "	4,081
Rochester, Syracuse & Eastern.....	78 "	6,613
Oneida	50 "	7,564
Hudson Valley	117 "	5,203
Buffalo & Lake Erie Traction, which includes the entire city of Erie, Penna.....	130 "	6,596
Auburn & Syracuse, which includes the city of Auburn	40 "	10,120

These various roads involve various conditions, none of which of course are precisely the same as those of the Hudson River and Eastern Traction. It is indeed remarkable if it is so favorably situated as to produce annual earnings so greatly in excess of those of any other interurban road in the State except the Auburn and Syracuse, which includes in its operations the street railroad system of the city of Auburn. Upon the basis of calculations adopted by the company, the operating revenues must be \$457 per day for 365 days in the year. Its calculation involves 32 trips each way daily, making 64 trips daily upon one-half hour schedule. Upon the rate of fare adopted this would involve an operating day of sixteen hours, or from 6 o'clock in the morning until 10 o'clock at night. In order to produce the given results each car upon each one of the 64 runs would have to carry 36 passengers at all times, in each zone. That there would be an average of 36 passengers at all times in each car for 64 runs daily, 365 days in the year, would certainly be good business for an interurban road. The foregoing statement, it should be clearly understood, must be modified to the extent that there is short riding within the limits of a zone: in Ossining, White Plains, or elsewhere; and also it will be within the power of the company to increase the rate of fare by increasing the number of zones, or otherwise, subject to the power of this Commission to regulate the same.

It is proposed to build this road entirely with the proceeds of bonds. When built there will be no equity in the property behind the bonds to support and protect the bondholders' lien except the \$9000 paid in cash upon the stock. The

bondholders can get no returns upon their bonds until after there has been paid operating expenses and taxes and there has been set aside a proper amount each year for amortization. It is true that amortization may be for a time neglected, but such neglect would be against the interest of the bondholders, since as bondholders they have no control whatsoever over the matter; and the stockholders in their efforts to meet fixed charges may neglect that subject altogether with the result that in a few years the bondholders would find themselves with a dilapidated and worn out road with no funds provided for its renewal.

Purchasers of these bonds must understand clearly that in no event can they get more than 5 per cent per annum upon the face of the bonds as the return, while if the earnings are not sufficient to meet the fixed charges there will necessarily be a default, whereas if the same bondholders owned the stock instead of bonds they would get as returns all that the road earned above operating expenses, taxes, and amortization, and would run no more risk than they do now upon getting their interest returns. Bondholders can not expect 5 per cent return unless the business of the road assumes the magnitude claimed by the company. Bondholders take their risk of smaller earnings, the risk of the road not being properly kept up out of earnings, and in fact every risk there is in the operation of the road, there being practically no equity behind represented by stock investment. It is possible for every evil which ordinarily follows from a disproportion of bonds and stock, to be found in this case. We are unable to understand why persons with over \$600,000 to invest should be willing to do so for a 5 per cent return plus a 20 per cent discount on long term bonds, knowing they can get nothing beyond what the road earns, when by taking stock they could get all it earns net. But such seems to be the case.

The company insists upon building its road with bonds which it says it can sell. It says that it can sell no stock whatever even with the attractive financial condition above

outlined. This Commission, therefore, faces the alternative of preventing the construction of this road from Ossining to White Plains, or permitting it to be built upon bonds, although it can not prove by affirmative evidence that the returns will not be as great as those claimed by the company. However great the improbability, it must be admitted that it is theoretically possible that the earnings may take care of the interest upon the bonds as well as pay operating expenses and taxes. The responsibility of deciding this question should be placed upon the board of directors, under all of the circumstances of this case, and should not be assumed by the Commission. There is no positive provision of law which requires the Commission to assume this responsibility, and whatever responsibility it has in the matter is not imposed by statute but simply by its desire to see methods of financing new construction adopted which will adequately protect purchasers of the securities. It must distinctly disavow in this case any responsibility to the purchasers of the bonds as to the earning power of this road, or as to the probability or possibility, even, of the road paying its fixed charges. The directors must assume the sole responsibility of putting out upon the world these securities and of inducing people who have not studied the subject to invest their money. People who do invest their money in these bonds must make their own calculations as to their worth and as to the probability of their being worth the sum paid for them. The Commission can not undertake in this case to act as guardian for them, and the authorization of these bonds by the Commission must not be understood by any one that the Commission considers them a safe and prudent investment.

It should be stated that a bare majority of the Commission concurs in this disposition of the case, two Commissioners believing that the application should be granted only with a reasonable proportion of stock, leaving the courts to decide whether such course is within the Commission's power.

In the Matter of the Application of THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY for authorization to buy the whole or any part of the capital stock of the New York and Harlem Railroad Company at a price not exceeding \$175 per share.

In this matter The New York Central and Hudson River Railroad Company asks for authorization to buy all or any part of the capital stock of the New York and Harlem Railroad Company at a price not exceeding \$175 per share. The New York and Harlem Railroad Company owns a greater part of the Grand Central Terminal in the city of New York, and a line of railroad from that city to Chatham with a small branch extending to Port Morris. These properties were leased to the applicant on the 1st day of April, 1873, for a term of 401 years. The Harlem company also owns a line of street railroad in the city of New York which is leased to the Metropolitan Street Railway Company for a term of 999 years, expiring July 1, 2895.

The application is granted and the reasons therefor are stated fully in the opinion.

Decided December 28, 1911.

Albert H. Harris for The New York Central and Hudson River Railroad Company.

STEVENS, *Chairman*:

The New York and Harlem Railroad Company is a domestic corporation. Its road extends from the Grand Central Terminal in the city of New York to Chatham, with a small branch extending to Port Morris. It is the lessee of what is known as the Mahopac branch, extending from Golden's Bridge to Lake Mahopac. It is also the owner of a street railroad in the city of New York extending from the postoffice in New York city to Mott Haven at 138th street, a distance of 10.22 miles. This street railroad is leased to the Metropolitan Street Railway Company for a term of nine hundred and ninety-nine years, commencing July 1, 1896,

and expiring July 1, 2895, the lessee being obligated to pay all the expense of maintenance and operation and an annual rental of \$402,500. Its capital stock issued and outstanding amounts to \$10,000,000, consisting of \$8,656,050 common and \$1,343,950 preferred, the shares being of the par value of \$50 each: total number of shares 200,000. The total number of stockholders is 876, as appears by the stockbook of the corporation. This stock is widely distributed, owned in considerable part by trustees of estates, trust institutions, insurance companies, and the like. It appears from an inspection of the stockbook that no one interest or aggregation of family interests owns to exceed one-third of the entire capital stock. The funded indebtedness consists of bonds to the amount of \$12,000,000, bearing 3½ per cent interest payable semiannually, maturing May 1, 2000. The annual interest is \$420,000. The following is its condensed balance sheet as of December 31, 1910:

<i>Assets</i>	
Total investment in road and equipment.....	\$22, 100, 738.16
Cash	863, 183.98
Marketable securities	58, 097.89
Materials and supplies.....	56, 696.36
Unmatured interest and dividends receivable.....	12, 235.96
Other deferred debit items.....	139, 370.41
Total	\$23, 230, 322.76
<i>Liabilities</i>	
Common stock	\$8, 656, 050.00
Preferred stock	1, 343, 950.00
Mortgage bonds	12, 000, 000.00
Matured interest and dividends unpaid.....	2, 868.00
Matured funded debt unpaid.....	4, 625.00
Profit and loss.....	1, 222, 829.76
Total	\$23, 230, 322.76

The item for materials and supplies represents value of supplies conveyed to lessee companies and to be accounted for by them at the termination of leases.

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The following is its income account for the year ended June 30, 1911:

Gross rent accrued from leased road.....	\$1,822,500
Administration expenses	34,783
<hr/>	
Income from lease of road.....	\$1,787,717
Dividends declared on stocks owned or controlled.....	2,000
Interest on other accounts.....	23,260
Miscellaneous income	¹ 2,476
<hr/>	
Gross income	\$1,810,502
Interest accrued on funded debt.....	420,000
<hr/>	
Net corporate income.....	\$1,390,502
Dividends declared out of income.....	1,300,000
<hr/>	
Balance to profit and loss.....	\$90,502
Balance, profit and loss, June 30, 1910.....	1,185,957
Miscellaneous credits during the year.....	6,371
Miscellaneous debits during the year.....	¹ 60,000
<hr/>	
Balance, profit and loss, June 30, 1911.....	\$1,222,830

The New York Central and Hudson River Railroad Company makes application to this Commission for authorization to buy the whole or any part of the capital stock of the New York and Harlem Railroad Company at a price not exceeding \$175 per share.

The relations of the two corporations are as follows: On the 1st day of April, 1873, the Harlem company leased to the Central company its steam railroad and steam railroad property for a term of 401 years, the lease expiring April 1, 2274. There are now unexpired of this term 362 years from April 1, 1912. Supplemental agreements modifying to some extent the provisions of the original lease have been entered into between the two companies on the 15th day of May, 1882, and on the 5th day of October, 1898. In brief, the terms of the lease as it now exists are that the Central shall pay all maintenance charges and taxes, interest upon

¹Deduction.

the funded debt, and an annual rental of 10 per cent upon the capital stock, which rental is the sum of \$1,000,000 per year. The interest upon the funded debt being \$420,000 a year, the annual charge upon the Central arising from the terms of the lease is \$1,420,000. The lease is subject to the provisions of certain leases or agreements between the Harlem company and The New York, New Haven and Hartford Railroad Company, by which the New Haven company enters the Grand Central Terminal over the Harlem tracks from Woodlawn.

If the Central should acquire all of the stock of the Harlem at \$175 a share, the total purchase price would be the sum of \$35,000,000. At 4 per cent, the annual interest upon this sum would be \$1,400,000, which is practically equal to the annual rental paid by the Central to the Harlem together with the rental paid by the Metropolitan Street Railway Company. The Central, however, proposes to secure the money for such purchase substantially by an issue of debentures bearing 4 per cent interest, to be sold at not less than 90 per cent of their par value. In order to procure the sum of \$35,000,000 by a sale of debentures at 90, debentures to the amount of \$38,888,889 will be required, which would entail an annual interest charge of \$1,555,555.56. The interest charge, therefore, upon the proposed scheme of financing the operation, would be \$153,055.56 annually in excess of the rental now paid and the rental received from the Metropolitan for the use of the street railroad properties.

In passing upon this application the Commission has to consider (1) whether the interests of the public would in any manner suffer by a transfer of the Harlem stock from the present owners to the Central, and (2) whether the transaction is to such an extent unfavorable to the Central or unwise upon its part as to constitute an indirect injury to the public. This might well be the result of unduly increasing the fixed charges of the Central without any corresponding certainty of revenues with which to meet such charges.

Upon the first point it is sufficient to say that careful consideration has failed to disclose any reason for supposing that the public interests would in any respect suffer directly through the proposed change in stock ownership of the Harlem. The relations of the Central to this property have been fixed for so long a period by the terms of the lease, and will continue to be fixed for so long a time, that the railroad properties of the Harlem are to all practical intents and purposes, from an operating point of view, an integral part of the Central system; and from many points of view it is desirable that they should be such part in financing the operations of the Central. It is not to be questioned that these advantages may in time become very great and of direct interest and advantage to the public.

It appears that the Central, if it purchases the entire stock of the Harlem upon the terms mentioned, would increase its fixed charges to the amount of \$153,055.56, assuming that the operation is financed in the manner above detailed. The directors of the company have concluded that the advantages to be obtained by the stock ownership are sufficient to over-balance this increased charge. The entrance of the Central into New York city, for passenger service, is over the Harlem. Its passenger terminal in that city is at Forty-Second street. A portion of that terminal only is owned by the Harlem, a portion by the Central, and a portion by subsidiary corporations of the Central. The situation is exceedingly complex and confusing, entails great difficulties in accounting, is embarrassing in the extensive reconstruction and rebuilding of the Grand Central Terminal. In addition to the foregoing, the lease to the Central makes no provision whatever for additions and betterments to the railroad property of the Harlem at the expense of that company, and whatever betterments and additions are required in the public interest must be made by the Central at its own expense. This fact creates a situation which should be corrected if

possible. The Central has already spent millions of dollars upon the electrification of a part of the Harlem and in other additions and betterments to the steam railroad properties. The Commission regards it as desirable that the Harlem should ultimately be consolidated with the Central, and this seems to be practicable only through stock ownership. A review of all of the relations between the two companies and the consequences following on those relations induces the belief on the part of the Commission that the action of the directors of the Central in endeavoring to procure this stock is wise and that the desired authorization should be given.

It is unnecessary to enter into further detailed consideration of the case, the purpose of the Commission being at this time to make only a memorandum showing generally the reasons which in its opinion warrant the action it takes in granting the application for the purchase of this stock.

In the Matter of the Application of the CATSKILL TRACTION COMPANY under section 53 of the Public Service Commissions Law for permission to construct an extension from Leeds to Cairo, Greene county, N. Y.

The proposed extension practically parallels the existing steam line between Catskill and Cairo.

This steam line is operated only during the summer months, and while the through passenger and freight traffic between Catskill and Cairo now appears to be adequately served during these months by the steam line, there are no transportation facilities furnished during the Winter.

The present rates of fare on the steam line are much higher than those offered by the proposed electric railway extension.

The applicant company has stipulated to the Commission that it will reduce its bond issue for the proposed line to \$80,000, or about \$11,900 per mile, and finance the remaining cost of the extension by the issue of preferred and common stock.

After consideration of the facts in this case it is

Held, that the operation of the proposed line by giving a regular and frequent service at a low rate of fare, and maintaining this service during the Winter when operation on the steam line is discontinued, would be a decided public convenience to the permanent residents in the locality and of value to the summer population, and that the application should be granted.

Decided January 11, 1912.

Percy W. Decker for the applicant.

Lewis E. Carr, by John MacLean, for Catskill Mountain Railway Company, in opposition.

H. C. Mitchell, a bondholder of Catskill Traction Company, in favor of the application.

J. C. Finch for State Highway Commission.

SAGUE, Commissioner:

The present application proposes the construction of an extension of the railroad of the Catskill Traction Company

through the town of Catskill, the town of Cairo, and to and through the village of Cairo. Part of this extension is to be built along the highway and part on private right of way. The extension parallels in general the Catskill and Cairo railroad, which is a part of the Catskill Mountain Railway system. The proposed electric railroad extension will be about 6.7 miles long, making a total length of line to be operated by the Catskill Traction Company of about 12 miles.

The proposed extension is earnestly opposed by the Catskill Mountain Railway Company upon the ground that the extension is unnecessary and that it will seriously damage the existing railway property.

Because of this opposition, and in order that those interested in the proposed extension may be fully informed as to the attitude of the Commission in this case, a more complete statement of the proposition appears to be advisable than would ordinarily be justified by an application of this character.

History of Catskill Traction Company: This company was incorporated January 28, 1910, as a reorganization of the Catskill Electric Railroad Company. The Catskill Electric Railroad Company was incorporated January 22, 1897.

The present line extends from Catskill Point and village to Leeds, over the main street of Catskill and the Cairo turnpike. There is a branch from the main line to the West Shore station in Catskill. The total length of line now operated is 5.3 miles of single track.

The original company organized to build this road was called the Catskill, Cairo and Windham Railroad Company. It applied for a certificate under section 59 of the Railroad Law in 1896. This was opposed by the Catskill Mountain railway and the Cairo railroad on the ground that it would parallel their lines, and that the population and business of the section did not warrant two roads between Catskill and Cairo. Several hearings were had before the Board of Rail-

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road Commissioners, and on November 9, 1896, the Commissioners denied the application.

A new company was then organized, called the Catskill Electric Railway Company, to build a street railway from Catskill Point, through the village of Catskill to Jefferson, a suburb of Catskill village, a distance of about 2 miles, with a branch from the main line to the West Shore Railroad station. This road was not opposed by the Catskill Mountain railway, and a certificate was granted by the Board of Railroad Commissioners February 23, 1897.

The Catskill Electric railway subsequently filed a certificate of extension to Cairo, Oak Hill, and Windham, Greene county. The extensions however were not made. The Catskill Electric railway was opened for business December 4, 1900.

During the years 1904 and 1905 the road was extended from Jefferson to the village of Leeds, about 2 miles.

Summary of Reasons Stated by Applicant: The proposed construction is declared by the applicant to be a public convenience and a necessity, for the reasons —

1. That the villages of Cairo and South Cairo have no railroad facilities except in summer;

2. That the Catskill Mountain railway does not serve as a reasonable means of communication between the villages of Cairo, South Cairo, and Leeds;

3. That the passenger rates of the Catskill Mountain railway are very high as compared with other railroads;

4. That the Catskill Mountain railway has no direct communication with the West Shore railroad, the Catskill Traction being the only railroad in Catskill now having direct passenger connection with the West Shore road, and is now perfecting arrangements for shipping freight across the West Shore platform;

5. That a large number of persons owning real estate have consented in writing to the extension along the highways.

It may further be said that the electric railroad being standard gauge, and so located as to be readily connected

with the West Shore, is in better position to interchange freight in carload lots than the Catskill Mountain railway which is three-foot gauge.

The rate of fare from Catskill to Cairo on the Catskill Mountain railroad is \$1 each way. Round-trip tickets are sold, good to return the same day, at \$1.10, except in the Spring and Fall when these tickets are made good for ten days. The average rate of fare for all tickets sold is estimated by the Catskill Mountain railway officers at 90 cents each.

The rate of fare from Catskill to Cairo over the proposed electric railroad has not been decided, but in the application and computations made it has been assumed that 30 cents each way would be charged, or on the basis of 6 five-cent zones in the distance of 12 miles.

It is urged in the application that as the Catskill Mountain railway is not operated for five months in the year people are obliged to maintain teams to carry freight during this season, this team traffic is continued through the Summer, and the railway therefore loses a large amount of freight business which would be obtained by an electric road operating throughout the year.

There are said to be six stages now making the daily round trip between Cairo and Catskill, and about fourteen teams carrying heavy freight. There are also claimed to be many private vehicles carrying passengers and freight at all times of the year. Mr. G. W. Squires, who publishes a newspaper in Cairo, testifies that there are six stages carrying passengers to and from Catskill at 50 cents each, as compared with the railroad charge of \$1. These stages are operated throughout the year.

The frequent and regular car service which would be afforded by the electric line is also urged as a point of advantage as compared with the steam service. The present electric car service from Catskill to Leeds in the Summer is 30 minutes each way in the forenoon, and from 20 to 30 minutes during the afternoon, this service being maintained

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from 5:20 in the morning to 11:25 in the evening. Through the Winter, hourly service is afforded from Catskill to Leeds. With the extension in operation it is proposed to run one car at least every two hours, and possibly an hourly service from Catskill to Cairo, thus making at least six round trips daily.

The applicant claims the extension would have a considerable freight business which would afford a total revenue of at least \$15,000 a year, or on the basis of \$2.50 per capita for the 6000 population which is said to be tributary to the extended line. Among the statistics upon which this estimate of freight is based are the populations of the tributary towns, as follows:

Village of Catskill.....	5,500
Village of Cairo.....	800
Town of Durham.....	1,600
Town of Greenville.....	1,600
Town of Windham.....	1,400

The total annual freight tonnage in and out of Catskill is stated as follows:

New York Central, inbound.....	23,000 tons
New York Central, outbound.....	5,000 tons
Total	28,000 tons
Catskill Evening Line, inbound.....	6,500 tons
Catskill Evening Line, outbound.....	5,000 tons
Total	11,500 tons

Of this total of 39,500 tons, applicant believes that the Traction company will be able to secure at least 5000 tons, as it will have direct connections with the West Shore railroad and the Evening Line of boats, and will also be alongside the ferry slip of the Catskill and Greendale ferry, and near the Hudson Day Line dock.

A proposed mail contract is figured at \$750 per year.

The Catskill Traction Company has been operating an automobile stage between Leeds and South Cairo, which is as far as the state road now runs, from August 2, 1911, to

the latter part of November. The following record of earnings is given:

<i>Month</i>	<i>Number of days run</i>	<i>Total income</i>	<i>Average income per day operated</i>
August	30	\$883.15	\$29.43
September	30	401.40	13.38
October	31	432.15	13.94
November	18	160.40	8.91
Totals	109	\$1,877.10	\$17.22

Assuming the regular earnings of such a stage through the months of July and August to be \$29.43, or on the same basis as August last; and the May, June, September, and October earnings on the same basis as September and October, or \$13.66 per day; and the balance of the year, six months, on the basis of November earnings, or \$8.91 per day, would give the following results:

July and August, 62 days at \$29.43.....	\$1,824.66
May, June, Sept., Oct., 122 days at \$13.66.....	1,666.52
Nov., Dec., Jan., Feb., Mar. April, 181 days at \$8.91....	1,612.71
Total	\$5,103.89

The expense of operation of this automobile stage has not been obtained, but assuming it to be \$2500 per year would leave a net income from this source of about \$2600.

The applicant urges that the growth of business shown by the present line, together with the successful operation during the past year, affords a satisfactory promise of success with the extended line, as it is claimed —

That with its present railroad limited to less than five miles it is losing much available business and leaving a large territory in need of better transportation facilities.

The record of earnings from 1904 to 1911 inclusive is given in the following table, the earnings for 1907 being omitted on account of unsatisfactory statement.

Comparative Statistics, Catskill Traction Company, for the years

	1910	1909	1908	1906	1905	1904
Total earnings.....	\$20,824	\$18,280	\$17,024	\$17,233	\$15,214	\$12,434
5-cent fares.....	409,872	361,239	332,688	319,638	303,167
Passengers carried.....	418,865	368,121	334,344	340,565	312,543	242,850

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This table shows an increase for the three years 1908 to 1911, as compared with the three earlier years, of 19 per cent in passengers carried and 25 per cent in total earnings.

Franchises have been granted by the local authorities of the Towns of Catskill and Cairo, certified copies of which are submitted. The certificate of incorporation covers the route over which it is proposed to extend the line. It is claimed that sufficient consents of property owners have been obtained to make it certain that there will be no delay on that account.

Estimates and Financing: The application originally contemplated a cost of construction of \$161,066.68, which it was proposed to finance by the issue of \$25,000 additional capital stock and \$160,000 of 5 per cent bonds. These estimates have been reduced by closer figuring and by the proposition to buy second-hand equipment, making revised estimates as follows:

Grading and track.....	\$64,658.50
Overhead construction and electrical work.....	15,829.50
Equipment: single-truck, second-hand cars.....	10,200.00
Balance: freight stations, right of way, and engineering work, making total.....	126,679.60

Earnings of Present Line: The earnings of the Catskill Electric railroad, the predecessor of the Catskill Traction Company, have in recent years been as follows:

Year 1908: operating income after payment of taxes.....	\$1,835
Leaving a deficit after payment of bond interest of.....	5,113
Year 1909: operating deficit of.....	1,800
After paying taxes, leaving a deficit after allowing for interest of	8,784
Year 1910: the accounts are complicated by the reorganization by which the Catskill Traction Company was formed.	

The year 1911 gives the best index of the earning power of the property in its present condition. The accounts show —

Operating revenues	\$20,824
Operating expenses	13,489
Taxes	1,208

Income from electric railroad operations.....	\$6, 126
Bond interest	3, 000
Rent deductions and amortization of debt discount.....	350
Net corporate income.....	\$2,776

The total car-mileage is about 117,000, making an expense per car-mile of 11.3 cents before payment of taxes, and 12.1 cents including taxes. An analysis of these figures, however, shows that the expenses for the year 1911 are abnormally low and do not correspond with full maintenance. For instance, there have been no rail renewals. The tie renewals amount to \$78. The road has a mileage of line of 5.3; counting 2600 ties per mile, equals 13,780 total. If these ties are renewed only once in fourteen years it would correspond to an annual renewal of about 1000 per year, at an annual expense of \$500, or \$422 more than charged for the past year. Many of the other expenses are abnormally low. For instance, the single-truck cars are operated by a motorman only, and it is questioned whether this practice would be satisfactory for the twelve mile run on the extended line. The motors and running gear of the cars appear to have been well maintained, but no painting has been done. On the whole, it appears certain that a sufficient allowance for maintenance and depreciation would wipe out the surplus of \$2776 above referred to and leave a deficit.

Estimate of Earnings Claimed by Applicant for Extended Line: The evidence furnished by Mr. Cowen, president of the road, may be summarized as follows:

Earnings based on winter population: Rates of fare: Catskill to Leeds, 10 cents; Catskill to South Cairo, 20 cents; Catskill to Cairo, 30 cents.

Jefferson, population 500: 50 round trips to Catskill, each person 10 cents per trip or \$5 per year.....	\$2, 500
Leeds, population 600: 40 round trips to Catskill, each person 20 cents per trip or \$8 per year.....	4, 800
South Cairo, population 250: 30 round trips to Catskill, each person 40 cents per trip or \$12 per year.....	3, 000
Cairo, population 600: 20 round trips to Catskill, each person 60 cents per trip or \$12 per year.....	7, 200

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Between Cairo and South Cairo, population 600: 6 round trips to Catskill, each person \$3 per year.....	\$1,800
Catskill, population 5400: 8 single trips at 20 cents each or \$1.60 per person per year.....	8,640
Rural population around South Cairo, 400; 6 round trips to Catskill at 20 cents, each person \$1.20 per year.....	480
Rural population around Cairo, 500: 6 round trips to Catskill at 60 cents, each person \$3.60 per year.....	1,800
Durham, population 1600: 3 round trips to Catskill at 60 cents, each person \$1.80 per year.....	2,880
Greenville, one-half population 800: 3 round trips to Catskill at 60 cents, each person \$1.80 per year.....	1,440
Total	\$34,540
Miscellaneous income	2,080
Total traffic based on winter population	\$36,620
Additional earnings estimated on account of summer boarder business, period of 60 days in July and August.....	24,916
Package express business.....	2,400
Mails from Cairo.....	800
Mails, West Shore branch.....	700
Total passenger, mail, and express earnings	\$65,436
Estimated freight earnings, 5000 tons at \$1.50 per ton.....	7,500
Total earnings all sources	\$72,936

The estimated expenses are based upon car-mileage, and assume 247,035 car-miles, which is about 130,000 car-miles or 110 per cent in excess of the car-mileage for 1911. This is figured at 12½ cents per car-mile, or about 21½ cents in excess of the amount shown on the face of the report for 1911. An expense for passenger operation is therefore involved of \$30,880. Add for expense of conducting freight traffic, assumed at 80 cents per ton on 5000 tons, \$4000, makes total operating expenses \$34,880; leaving a net revenue claimed from operation of \$38,056.

Catskill Mountain Railway System (opposing): The Catskill Mountain railway, Catskill to Palenville, 16 miles, opened in 1882; foreclosed and reorganized 1885;

Cairo railroad, 4 miles, built about same time, 1885;

Otis Elevating railway, open for traffic 1892;

Catskill and Tannersville railway built from 1893 to 1899.

The auxiliary roads were built by parties interested in the Catskill Mountain railway, principally to benefit that railway and the Catskill region. All of the lines are three-foot gauge.

The Catskill Mountain railway pays the Cairo railroad 6 per cent of the cost of the road in addition to maintenance expenses and taxes; under lease from year to year.

The Otis railway and the Catskill and Tannersville railway are paid \$4800 a year by the Catskill Mountain railway in consideration of their making and maintaining the connection from Otis Junction through to Tannersville.

The capitalization of these lines is as follows:

Catskill Mountain Railway:

1st mortgage bonds.....	\$39,000
1st income bonds.....	238,000
2nd income bonds.....	15,600

Cairo Railroad:

Stock.....	\$24,500
1st mortgage bonds.....	25,000

Otis Railway:

Stocks.....	\$65,000
1st mortgage bonds.....	71,000

Catskill and Tannersville Railroad:

Stock.....	\$80,000
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The testimony indicates that the total cost of construction of these railways was \$970,000 actually paid in cash, corresponding to the following cost per mile, including equipment:

Catskill Mountain Railway.....	\$26,975 per mile
Cairo Railroad.....	12,268 per mile
Catskill and Tannersville Railroad.....	24,550 per mile

The average rate of interest paid on the \$238,000 first income bonds of the Catskill Mountain railway for the past 24 years is claimed to be less than 1½ per cent. No dividends have been paid on the stock.

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Mr. Charles A. Beach, the manager of the Catskill Mountain railway, claims that the towns tributary to the proposed extension of the electric line have lost in population since 1865 and now average less than 20 persons per square mile. It is claimed that the territory is generally a poor farming section, and relies principally upon the summer boarding house business for its support, and that this business is practically covered in three months. During the other nine months of the year it is said that the passenger and freight business of the town of Cairo is not sufficient to support one railroad.

It is claimed that the new road can not operate with profit at thirty-cent fare, that there is not sufficient business to support both roads, and if the electric line is extended it will inevitably result in the bankruptcy of both roads and the consequent financial ruin of the Catskill Mountain Railway system. It is claimed that there are but 63 houses and one hotel directly tributary to the proposed extension, and while the present road serves a population of about 6000 people living close to its line, the extension would only serve an additional population of from 1000 to 1500 people.

It is claimed that the estimate of earnings submitted by the applicant is greatly exaggerated, as shown by a comparison with the earnings of the Cairo branch of the Catskill Mountain railway which are detailed as follows for the years 1909 and 1910.

Passengers between Cairo and Catskill in 1909:

May	995
June	1,738
July	7,634
August	11,762
September	4,122
October	1,877
November	620
December (1st ten days).....	166
Total	28,914
at 90 cents per person, \$26,022.	

Total, 1910	27,214
at 90 cents per person, \$24,492.	
Freight earnings between Cairo and Catskill:	
1909	\$14,860
1910	13,821

From these figures it is concluded by the opposition that if the new line secures the entire passenger business between Catskill and Cairo at 30 cents per passenger, its earnings from this source will only be about one-third of those estimated.

Mr. Beach believes that the trolley line would not increase the summer business much —

Because I think we have got it as high as we can get it. All the houses there are full at this time of the year. [August.] The season is short. I do not think anybody up there is going to build any new boarding houses for summer boarders.

He adds:

About 1830 a road was built from Catskill village through the towns of Catskill, Cairo, and Durham to Oak Hill. After trial of a few years the railroad was abandoned and the tracks were taken up. At that time the territory was more promising for such a venture than at present, as the Albany and Susquehanna railroad had not been built across the State.

A table showing the operating income and deductions therefrom for the Catskill Mountain Railway system for the years 1907 to 1911 inclusive is submitted herewith.

COMBINED INCOME ACCOUNT, YEARS 1907 TO 1911
Catskill Mountain Railway, Cairo Railroad, Catskill and Tannersville Railway, Otis
Railway

Item	1907	1908	1909	1910	1911
Total freight revenues	\$30,913	\$27,940	\$31,305	\$32,712	\$25,735
Total passenger revenues	67,759	70,153	66,616	63,747	63,666
Total miscellaneous revenues	117	278	235	298	252
Total revenues	\$98,789	\$98,371	\$98,156	\$96,756	\$89,653
Operating expenses and taxes	74,106	73,753	80,073	72,411	76,532
Operating income	\$24,683	\$24,619	\$18,082	\$24,345	\$13,121
Non-operating income, interest	175	164	160	175	175
Non-operating income, Cr. to C. & T. Ry. from C. M. Ry. account construction and maintenance	4,800	4,800	4,800	4,800	4,800
Gross income	\$29,658	\$29,583	\$23,042	\$29,320	\$18,096

COMBINED INCOME ACCOUNT, YEARS 1907 TO 1911 (*concluded*)

Item	1907	1908	1909	1910	1911
<i>Deductions:</i>					
Rentals paid by C. M. Ry. account lease Cairo Ry.	\$2,944	\$2,944	\$2,944	\$2,944	\$2,944
Rental, Terminal H. R. Day Line, paid by C. M. Ry.	.....	1,000	900	1,000	1,000
Rentals paid by C. M. Ry., account C. & T. Ry. maintenance, etc. (see above)	4,800	4,800	4,800	4,800	4,800
Interest 1st mtge. bonds C. M. Ry.	1,992	1,950	1,950	1,950	1,877
Interest bond subscription C. & T. Ry.	2,392	2,408	611	611	602
Interest notes C. & T. Ry.	.....	.....	1,800	1,800	1,800
Interest funded debt Otis Ry.	3,550	3,550	3,550	3,550	3,550
Interest notes Otis Ry.	1,127	1,280	1,219	1,219	1,201
Other interest	.....	.....	.....	100	100
*Total interest charges	\$9,061	\$9,168	\$9,130	\$9,230	\$9,130
Net corporate income	\$12,853	\$11,670	\$5,268	\$11,346	\$222
Dividends C. & T. Ry.	1,500	1,500	1,500	1,500	1,500
Interest income bonds C. M. Ry.	6,926	6,118	7,052	10,236	.....

* The Cairo Ry., a lessor company, reports the receipts of above rental of \$2944.35; and disbursements each year as follows: taxes and administrative expenses about \$73; interest on funded debt of \$25,000 at 6 per cent, \$1500; dividends, 5½ per cent on capital stock of \$24,500, \$1347.50.

The operating income for the four years 1907 to 1910, after payment of all expenses and taxes, has been about \$24,500, except in the year 1909 when the income fell to \$18,000. In the year 1910 the Catskill Mountain railway lost a profitable traffic in shale because of the failure of a brick making establishment by which this material was used. The consequence appears to have been a reduction in the operating income of over \$11,000 in 1911.

The resulting operating income for the year 1911, after the payment of operating expenses and taxes, is \$13,121. The following are the deductions for rentals and interest charges without considering the intercorporate payments to the Catskill and Tannersville and to the Cairo railroads:

Rental to Hudson River Day Line for terminal	\$1,000
Interest charges	9,130

Net income	\$2,991
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Peak-load Caused by Heavy Summer Travel in July and August: The testimony in this case shows a very heavy peak-load due to the summer passenger traffic in July and August

from the northbound day boat, especially on Saturdays. A count made Saturday, August 12th, of passengers from the northbound boat, showed as follows:

Taken in wagons and stages.....	280
Walked to Catskill.....	40
Used trolley line.....	220
Catskill Mountain railway, 12 cars with about 40 people each.	480

Total about	1,000
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A report from our electric railroad inspector refers to this peak-load condition and states that it will materially increase the cost of operation per car-mile over the cost of operating the service necessary for the permanent population; and adds that if the electric railway should be called upon to carry this entire load the requirements would far exceed the estimated addition to rolling stock and increase expenditures for that purpose with attendant fixed charges.

It appears clear that the continued operation of the steam line to Cairo is essential to satisfactory passenger service to this point, unless electric railway equipment is to be provided decidedly in excess of that covered in the estimates before us. It is also clear that if the Catskill Mountain railway is to be called upon to stand any reduction in the earnings from this traffic, it will be necessary for the management to reduce expenses to the limit; and our inspector has made a rough estimate of possible reductions in train mileage to Cairo without interfering with the above peak-load service. This indicates a possible saving of 19,080 train-miles per year. The annual report of the Catskill Mountain railway shows 51 cents per train-mile as the direct movement expense for all classes of trains, and is probably as great a reduction in cost as can be safely assumed for this reduction in train mileage. The amount thus indicated is \$9730 per year.

Conclusions as to Facts: The following conclusions are, we think, warranted as to the facts in this case:

1. The proposed extension practically parallels the existing line between Catskill and Cairo. The steam line, however, departs widely from the highway in places to secure improved grades, and the proposed electric line would therefore serve the local traffic along the highway better than the steam line does.

2. The through passenger and freight traffic between Cairo and Catskill now appears to be adequately served during the summer months by the steam line. The summer train service appears to be sufficient for the requirements, and although the rates of passenger fare are high, averaging about seven cents per mile, the earnings shown by the annual reports afford no basis for the Commission to require a reduction. This we believe also to be true of the freight rates.

3. Service through the Winter on the Catskill Mountain railway would no doubt be a great convenience to the residents of this region, but we do not think sufficient proof could be given of earnings from such service to justify the Commission in ordering it.

4. The present line of the electric railway is earning no margin over operating expenses and bond interest, if fair allowance is made for average maintenance and depreciation charges.

5. A comparison of the estimated earnings submitted by the applicant, with the earnings of the present line and of the Catskill Mountain railway between Catskill and Cairo, indicates that the applicant's estimates are entirely too high.

6. It is clear that the operation of the proposed line, by giving a regular and frequent service at a low rate of fare and maintaining this service during the five months of Winter when operation on the steam line is discontinued, would be a decided public convenience to the permanent residents in the locality and of value to the summer population.

7. The testimony and examination in this case do not indicate conclusively whether the proposed extension will pay. The probability is indicated, however, that there will be a

sufficient margin over operating expenses to pay interest on a small bond issue.

8. The financial ability to construct the extension has not been clearly proved. The local interest, however, appears to be strong enough to warrant the belief that considerable money can be obtained locally by the sale of preferred stock so that the bonds to be issued will be satisfactorily protected and therefore salable.

9. It is clear that there is not business enough in this territory to support two parallel steam railroads. The only reasons for favorably considering the proposed extension are the fact that it is a trolley road continuous with the present line through Catskill, connecting with the ferry docks and West Shore railroad; its nearness to existing highways; the proposed operation throughout the year, and the low fares and frequent service which are promised.

Decision of This Case: The Commission believes that a favorable decision of this case should depend somewhat upon the willingness of the applicant to reduce the bond issue proposed. The original proposition contemplated the issue of a sufficient amount of bonds to pay for the entire cost of the construction outside of engineering, legal expenses, and supervision. It is believed that the probable earning power is not sufficient to warrant as large a bond issue as this proposition would involve. Suggestions have therefore been made to the applicant that a substantial part of the cost of construction should be paid by the issue of preferred stock for cash at par, as a protection to the bondholders and as a guaranty of local faith in the enterprise. This proposition has been favorably considered by the applicant, and a stipulation has been filed with the Commission that the bond issue for this extension shall not exceed \$80,000 par value, or \$11,900 per mile, which sold at 85 per cent would realize \$68,000 cash. This would involve a total interest charge for the entire line of \$7000, an increase of \$4000 over the present amount. The balance, amounting to about \$60,000, is to be supplied by

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the sale of 6 per cent cumulative preferred stock, to be sold at par, and it is understood that this stock will be taken principally by local investors who are familiar with the business which it is proposed to develop by the proposed extension.

With this limitation of bond issue it is believed that the extension would have a sufficient prospect of success to justify the Commission in consenting to the construction.

In this connection it should be stated that the Commission feels that less investigation of financial prospects is ordinarily necessary in case of an extension than would be required by a proposition to construct an entirely new line. The operators of an existing line may reasonably be supposed to have the ability and knowledge to enable them to form a better judgment of the prospects of success of an extension than the promoters of a new line who may have no tangible basis upon which to form their estimates.

The probability is recognized that the extension will prove harmful to the Catskill Mountain Railway system, and the financial statements for these roads show that they have no margin to stand reduced earnings without involving default of interest charges. We think however that reduced passenger earnings of the steam road between Catskill and Cairo may be partially offset by reduction in service and in operating expenses.

Considering all the circumstances in the case, and especially the fact that the present steam line affords no winter service while the extension promises such service with a much reduced rate of fare, we believe that the detrimental effect on the Catskill Mountain Railway system is not sufficient cause for a denial of the application.

We think there is reason to believe that the electric line will have but little adverse effect on the freight earnings of the steam line; and on the contrary, that the new line, if successful, may build up the territory and justify the establishment of additional accommodations for summer boarders,

and in the end increase the freight traffic and thus at least partially offset the reduction in passenger earnings.

The majority of the Commission believes that the foregoing memorandum does not sufficiently consider the possibility of the creation of a large amount of new business by the building of this extension, believing that the history of electric lines throughout the country shows a development of business larger than preliminary estimates would warrant, and that such experience would justify a more favorable view of the probable earning power of this extension than has been indicated.

In the Matter of the Complaint of the ATTICA WATER, GAS AND ELECTRIC COMPANY *against* ALDEN-BATAVIA NATURAL GAS COMPANY, alleging unjust discrimination.

Where one natural gas corporation (A) which is a producing and a distributing company has made a contract with another natural gas corporation (B) which is a company distributing to consumers, a third natural gas corporation (C) which also distributes directly to consumers has a right to demand from Corporation A that natural gas be supplied to it on the same terms upon which it is supplied to Corporation B.

Corporation C brought its petition to the Commission demanding the service above described from Corporation A. Corporation A, the respondent, answered with a general denial, and on the hearing elected to make a plea in the nature of a demurrer on the ground that the Commission had no jurisdiction in the premises.

Held, that the Commission has jurisdiction and that the case should proceed to a further hearing, at which the respondent may under its answer show any good reason why the Commission should not require it to supply natural gas to Corporation C on the same terms and conditions as to Corporation B.

Submitted December 18, 1911. Decided January 23, 1912.

G. P. Stockwell, 53 Main street, Attica, N. Y., for the complainant.

Bayard J. Stedman, 9 Masonic Temple, Batavia, N. Y., for the respondent.

OLMSTED, *Commissioner*:

The Attica Water, Gas and Electric Company, the petitioner, is a natural gas and electrical corporation distributing to customers in the village of Attica. It also owns some producing wells.

The Attica Natural Gas Company is also a distributing corporation in the village of Attica, and is a competitor of the Attica Water, Gas and Electric Company. The Attica Natural Gas Company is also the owner of some producing wells.

The supply of gas in the wells of both companies has diminished of late. In consequence the price of natural gas in Attica has been raised from time to time until it is now \$1.10 per thousand cubic feet.

The Alden-Batavia Natural Gas Company is a producing and distributing corporation which is the owner of a number of large gas wells located in Genesee and Wyoming counties. It has no mains within the village limits of the village of Attica. It sells gas to local consumers in the village of Batavia, and it has been before the Commission several times of late asking for extensions of its mains into additional territory. In pursuance of the last application made by it permission was given to run the mains of this company from Batavia through the town of Alexander and up to the village line of the village of Attica, which is located in Wyoming county and adjoins the town of Alexander situate in Genesee county. The mains have been laid to the point named, and a contract has been entered into between the Alden-Batavia Natural Gas Company and the Attica Natural Gas Company by which the Alden-Batavia Company agrees for a period of ten years to furnish the Attica Natural Gas Company with as much gas as may be needed to supply the customers of the Attica Natural Gas Company in the village of Attica at a price of 30 cents per thousand cubic feet. The Attica Natural Gas Company is in turn offering to its customers gas at 50 cents per thousand cubic feet. Demand has been made upon the Alden-Batavia Natural Gas Company by the petitioner, the Attica Water, Gas and Electric Company, that it furnish the petitioner with gas to be used for distribution at the same rate at which it furnishes the Attica Natural Gas Company, namely 30 cents per thousand cubic feet.

The Alden-Batavia Natural Gas Company filed an answer in the way of a general denial, and alleging among other things that this Commission had no power to compel the respondent to enter into a contract with the complainant.

A hearing herein was held in Buffalo on the 1st day of December, 1911. At that hearing the respondent, while it

did not waive any defense which it might have upon the merits to the allegations of the complaint, made a plea in the nature of a demurrer and claimed that the Commission had no jurisdiction upon the facts shown. The case was thereupon submitted for a determination of this point, and briefs have been handed up on each side respecting it. These have been carefully considered and the Commission has obtained the opinion of its counsel thereupon.

It is apparent that the complainant is a corporation, that the respondent is a gas corporation. Subdivision 3 of section 65 of the Public Service Commissions Law reads as follows:

No gas corporation, electrical corporation or municipality shall make or grant any undue or unreasonable preference or advantage to any person, corporation or locality, or to any particular description of service in any respect whatsoever, or subject any particular person, corporation or locality or any particular description of service to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

We are of the opinion that the respondent has brought itself under the terms of section 65. What its duties and relations might be toward the complainant were the respondent purely a distributing corporation we do not here determine, nor do we say that one distributing corporation can be compelled to furnish a "break-down" service for another corporation which is its competitor in the same field. That is not the situation in the case before us. The respondent at the present time is a producing as well as a distributing company. It has elected to be both a wholesale and a retail (if such terms may be used) dealer in natural gas. It is furnishing and selling under a contract to a corporation entirely distinct and separate from itself, gas to be distributed and re-sold by its vendee to the general public. This is clearly a different kind of service from that which it renders to other consumers who purchase from it gas for immediate consumption. Having elected to go into that kind of service—to become a "wholesaler"—it must under the law serve all "retailers" applying to it upon the same terms, and it can not discriminate between them.

A person or corporation may desire natural gas for either of two entirely dissimilar purposes: (1) for his or its own use and consumption; (2) to sell to others wishing it for use and consumption. There is a clear distinction in principle as to the duty of the natural gas company in the two cases. If it engage in the business of selling for use and consumption only, within the territory it attempts to serve, it must serve all persons alike without unreasonable discrimination, and it must also make every reasonable effort to be able to furnish the required supply of gas to all its customers. Being a distributing company supplying all classes of consumers in its territory, clear public policy requires that it be required to protect and conserve its supply of gas to the end that it may at all times, so far as possible, be able to meet the wants of its customers who desire such gas for their own use and consumption.

Natural gas companies frequently do not have it in their power to increase their supply of gas. They are limited to the output of certain wells, and can supply no more than that whatever the demand may be. This is an important fact which must be reckoned with in determining the principles of natural gas distribution. It leads directly to the conclusion that in some cases, if not all, the company may legitimately, in the protection of its customers and the conservation of its limited supply for their use, refuse to go into the business of supplying gas to one who desires to sell it again to a new group of customers. Enlarging the number of customers by such a course might in most cases, and would certainly in some cases, work great evil by creating a demand impossible to supply. The result would be poor and inadequate service to all. To the restricted number of customers upon the company's own distribution system the service might be adequate. These considerations point to the conclusion that under some conditions the Commission would be justified in prohibiting a company engaged in distribution from selling to another distributing company.

Every consideration of public welfare sustains the holding that a natural gas company may properly confine its sales to those desiring its commodity for direct consumption and thereby retain control of the number of its customers, limiting the same to that number which it can serve adequately.

But when it voluntarily enters the field of supplying gas to a person or corporation which does not desire it for consumption but to sell and distribute to others for their consumption, the case is changed. It becomes subject to the provision of law that it must extend the same treatment to all persons and corporations who stand in like case. It can not sell to one and arbitrarily refuse to sell to another. One corporation desiring gas from it for distribution purposes *prima facie* has precisely the same right to obtain it as another. A public service corporation can not arbitrarily refuse to supply one of a class which it has undertaken to serve. It must justify its refusal by good reasons.

The jurisdiction of the Commission in this case is as clear as in the case of a refusal of a distributing company to serve a customer living upon a street through which its main is laid.

The respondent company must justify its refusal and may be able so to do at a future hearing. The sole question now presented is as to the jurisdiction of the Commission. This the Commission clearly possesses.

The case should proceed to hearing on the facts.

In the Matter of the Complaint of RESIDENTS OF THE VICINITY OF AND BETWEEN WAVERLY AND CHEMUNG *against* ELMIRA, CORNING AND WAVERLY RAILWAY as to rate of fare between Holbert's Crossing and Waverly.

The order of the Commission entered in the case of *Wheaton v. Elmira, Corning and Waverly Railway*, 2 P. S. C., 2nd D., 244, September 20, 1909, providing a fare not in excess of five cents for transportation of passengers over its line between the village of Waverly and Holbert's crossing and intermediate points, the fare theretofore charged having been ten cents per passenger, was limited to one year, and at that time no opinion was expressed as to the effect of an extension of respondent's line into the center of Waverly, such line then terminating at the western boundary of the village of Waverly. The ten-cent fare having been reestablished and complaint against such fare having been renewed in this case it is, after hearing, now *held* upon the putting in by respondent of school commutation tickets between Holbert's crossing and Waverly the complaint should stand dismissed.

Submitted September 1, 1911. Decided January 30, 1912.

Frank L. Howard for complainants.

T. H. Burgess for respondent.

DECKER, *Commissioner*:

Upon order dated September 20, 1909, in the matter of the complaint of C. E. Wheaton against Elmira, Corning and Waverly Railway, respondent was directed and required to establish and keep in force for a period of at least one year a fare not in excess of five cents for the transportation of passengers over its line between the village of Waverly and Holbert's crossing and intermediate points, the fare theretofore charged having been ten cents per passenger. In view of respondent's poor financial condition and the possibility that under the operation of said order its gross revenue might be materially diminished, the effectiveness of the order was limited to one year, with the right remaining in respondent

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to apply, upon suitable showing, for a modification or abrogation of the order at any time. It was stated in the opinion:

When respondent's service shall be extended into the center of Waverly [as was then contemplated] it is possible that the fare limit at Holbert's for Waverly traffic should be brought eastward [or toward Waverly] a short distance, but that is a question on which no opinion can now be expressed.

The five-cent fare was established and put in effect October 4, 1909. Respondent did not apply for a modification or abrogation of the order. Effective March 15, 1911, some time after the one year period had expired, respondent increased its fare between the village of Waverly and Holbert's crossing to ten cents per passenger, thereby restoring the fare originally complained of, and such fare is still in force. At the same time respondent reestablished its five-cent fare limit point from Waverly at Wilson's crossing, which is intermediate to Waverly and Holbert's crossing and nearer Waverly by 6741 feet, or 1.27 miles, and which was the first five-cent fare break-point out of Waverly when the Wheaton complaint was filed.

Fifty-one residents of the vicinity of and between Waverly and Chemung, by petition, complained to the Commission of such action increasing the fare to ten cents between Holbert's crossing and Waverly, and hearing thereon has been had. Complainants ask again in this case that the five-cent fare point from the village of Waverly be permanently fixed at Holbert's crossing. It also appears from the complaint that residents of the vicinity mentioned do not want the five-cent fare at present in force from Wilson's crossing to the village of Chemung disturbed.

The conditions then existing have been changed by extension of the line and application of the Waverly fare over a greater distance. The five-cent fare ordered then covered a distance of 16,603 feet or 3.14 miles, or from the terminus of the line at Broad street, on the western edge of the village of Waverly, to Holbert's crossing. At that time additional transportation in the village of Waverly was afforded by the

line of the Waverly, Sayre and Athens Traction Company, which then operated the Elnira, Corning and Waverly line for that corporation, and there was a break of 18 feet between the two lines. For such additional transportation to Fulton and Broad streets in Waverly the fare was five cents. It appears that track connection has been made since the decision of the Commission in the former case, that respondent is operating its own line, and that its cars now proceed past the former terminus at Broad street over the tracks of the Waverly, Sayre and Athens Traction Company to Fulton and Broad streets, in the center of the business portion of Waverly, an additional distance of 1823 feet. Passengers may now travel eastward from Holbert's crossing and into the village of Waverly a maximum distance of 18,426 feet, or approximately 3.49 miles. The ten-cent fare also now covers travel to and through the village of Chemung to the Chemung River bridge, west of Holbert's crossing, or a maximum riding distance from Fulton and Broad streets of about 5.7 miles.

For the additional 1823 feet now traversed by respondent's cars in the village of Waverly over the tracks and by the electric power of the Waverly, Sayre and Athens Traction Company, respondent pays the latter company one and one-half cents per passenger. Its revenue per passenger for the ten-cent riding distance to and from Fulton and Broad streets in Waverly would therefore seem to be eight and one-half cents.

The distance from Fulton and Broad streets via the trolley lines to Wilson's crossing is 2.2 miles. The next five-cent zone, Wilson's crossing to the Chemung River bridge, is 3.2 miles. It is the contention of respondent that Wilson's crossing, rather than Holbert's crossing, is the fairer zone limit or fare break-point. By establishing the first five-cent fare break-point at Holbert's crossing, travel from Fulton and Broad streets would cover a distance of 3.49 miles; and if the next break-point were fixed at the Chemung River bridge, that zone would cover a distance of 2.21 miles. The shortest

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five-cent zone appears to be from Elmira to the city line, 1.4 miles; and the next shortest, Wilson's crossing to Waverly, 2.2 miles.

Respondent has kept a record of the number of passengers on and off the trolley at Wilson's and Holbert's crossings from March 27 to July 9, 1911, after the fare was reestablished at ten cents, but not as to direction traveled. No aggregate amount is given, but the average at Holbert's crossing per day, on and off, in both directions, is 4; at Wilson's crossing the average is 6 and a fraction.

It appears that the increase in fare has induced some school children living nearer to Holbert's crossing, and also west of Holbert's, to walk to and from Wilson's crossing to obtain the five-cent fare to Waverly. There are seven families residing on the River road between Wilson's and Holbert's crossings. At the last school term six children were sent to Waverly to attend school from the town of Chemung, but the number varies from time to time. There are now about eighteen children in the school district, both sides of the river, and of this number about eight would naturally use Holbert's crossing and live either north or west of the crossing. Thirteen children would be nearer Holbert's than Wilson's crossing. Thirty-seven families are best accommodated at Holbert's crossing for travel to Waverly. Sixteen families are best accommodated at Wilson's crossing. The increased fare has decreased the Waverly travel from Holbert's crossing, and some passengers now walk to Wilson's.

As shown by certified copy on file with the case, the provision in the franchise of the Town of Chemung to Elmira, Corning and Waverly Railway relating to fare reads as follows:

8. The maximum fare for each passenger from any point in the town of Chemung through to Waverly shall not exceed three cents for each mile or fraction thereof and the maximum fare for each passenger from any point in said line to any other point thereof shall not exceed three cents for each mile or fraction thereof; provided however that said railway shall not be compelled to accept any fare of less than five cents.

For the distance now covered by the Elmira, Corning and Waverly route between Holbert's crossing and Fulton and Broad streets in Waverly this maximum fare would amount to 10.47 cents. There is therefore no disregard of the franchise maximum by the ten-cent charge between Holbert's and the terminus in Waverly. The distance from the present terminus in Waverly to Wilson's crossing is about 11,685 feet, or 2.2 miles. At a maximum franchise fare of three cents per mile this would give 6.6 cents to Wilson's crossing, the present fare break-point where the five-cent fare is charged. Under the franchise the railway is not required to accept any fare of less than five cents, and this would warrant another fare of five cents after a distance of about 1.1 miles had been traveled.

The exigencies of this case do not require consideration whether there should be one set of fares between Elmira, Corning and Waverly points and the terminus of its tracks at the edge of Waverly, and another set of fares between such points and the end of its operations 1823 feet farther, at Fulton and Broad streets in Waverly. If that is done for Holbert's crossing, consistency would require it to be done from all points on the Elmira, Corning and Waverly line, and we have no showing here that any considerable number of riders desire or should have the double set of fares.

The aim of respondent to increase its revenue by imposing the additional five cents for each passenger from Holbert's crossing is partly defeated, because the testimony shows that some persons, including school children, now walk to and from Wilson's crossing and thereby obtain the five-cent rate.

No round-trip tickets are offered for sale, except between Wellsburg and Lake and Water streets, Elmira, a distance of 6.9 miles, and these may be purchased for 25 cents, or at a price equal to 12½ cents each way. In addition, a transfer privilege is available to any point in the city of Elmira over the Elmira Water, Light and Railroad Company's lines. Out of this respondent must pay the Elmira Water, Light and Railroad Company three and one-half cents for each

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passenger to and from Lake and Water streets. This round-trip fare is said to be required under the Wellsburg franchise. Respondent's compensation for this class of transfer traffic would therefore seem to be about 1.3 cents per mile. If the fare from Holbert's crossing to Fulton and Broad streets were reduced to five cents, and out of that respondent paid the Waverly company one and one-half cents, retaining for itself three and one-half cents, the revenue received for the 3.49 miles traversed would be about one cent per mile; but under the agreement of the two companies a fare reduction ordered by the Commission would be the basis of readjustment of the one and one-half cents allowance to the Waverly company.

The decision in the former case was based upon the conditions then existing. The opinion rendered in that case expressly reserved the extension of line into Waverly as constituting a new and material element, and the fare reduction requirement was limited to one year. The former ten-cent fare from Holbert's to the edge of Waverly yielded 3.18 cents per mile. The present ten-cent fare over the line as extended to about the center of Waverly yields 2.58 cents per mile. A five-cent fare for the present distance would yield 1.43 cents per mile. Taking no account of the one and one-half cents paid for the trackage use and power of the connecting line in Waverly, we are not satisfied that the traffic involved or the financial condition of the respondent company warrants an order reducing the fare to the five-cent basis.

The original complaint resulted from the refusal of the company to put in a school commutation fare of five cents. The law has since been amended, giving the Commission authority to order a carrier to publish and charge reasonable commutation rates for scholars and others. At the hearing upon this complaint respondent, by its general manager, offered in settlement of the controversy to put in effect a monthly school commutation ticket for children certified by the school trustees in an application for ticket as attending school in the village of Waverly, limited to cars arriving in

Waverly between 8 and 9 o'clock in the morning and returning from Waverly between 3 and 5 o'clock in the afternoon, for a fare of five cents per ride. This would be the regular 46-ride monthly school ticket limited to scholars not over eighteen years of age. Under all the circumstances we think this should constitute the disposition of the case. Respondent will be notified that upon the establishment of such school commutation the complaint herein will be dismissed.

In the Matter of the Complaint of RESIDENTS OF THE TOWNS OF MOUNT HOPE, GREENVILLE, AND DEERPARK, Orange County, *against* ERIE RAILROAD COMPANY as to conditions at the Graham station on said railroad, which station was formerly called Guymard.

Respondent discontinued the stopping of three trains at Graham station on its main line, which trains served generally the local passenger business and had been stopped at Graham for a long period of years. The evidence shows that these trains if stopped at Graham on station signal or notice to train conductor would accommodate passengers materially and in ways not provided by other trains stopping at Graham. The travel to and from Graham is not large, but on the other hand is not shown as diminishing. *Held*: 1. It is not conclusive in this case whether the travel to and from Graham is small or considerable. 2. The three train stops in question should be restored. 3. The railroad company is entitled to keep a record of the patronage of each train to and from Graham during a period of six months or more and present the same with a petition for abrogation or modification of the order, for the purpose of showing that such patronage is so insignificant that no reasonable basis exists for subjecting it to the expense or inconvenience of stopping such trains or any of them upon notice or signal.

Submitted January 19, 1912. Decided February 12, 1912.

Charles W. Clark for complainants.

T. H. Burgess for respondent.

DECKER, *Commissioner*:

Prior to March 5, 1911, the station on the Erie railroad formerly known as Guymard and now called Graham had the following train service:

Westbound:

No. 17	7:39 a. m.
No. 21 (now No. 173)	10:41 a. m.
No. 23 (now No. 177)	2:15 p. m.
No. 25	4:24 p. m.
No. 35 (now No. 183)	7:31 p. m.

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P. S. C., 2d D.

Eastbound:

No. 36	6:28 a. m.
No. 42 (now No. 172)	7:51 a. m. (stopping on signal)
No. 24 (now No. 176)	3:42 p. m.
No. 26	7:23 p. m. (stopping on signal)

On or about that date the following train stops at Graham were discontinued:

Westbound:

No. 25 (now No. 179)

Eastbound:

No. 36 (now No. 170)
No. 26 (now No. 178)

On February 27, 1911, the complaint in this case was filed asking that train No. 30 (as then and now listed), eastbound, be required to stop on signal at Graham. At subsequent hearings no testimony whatsoever was offered upon the need of that train and no necessity for stopping it is shown.

At the hearing had in Middletown, N. Y., November 17, 1911, the complainants were permitted to amend the complaint by extending such complaint to the discontinuance of trains Nos. 170, 178, and 179 for service at Graham. Respondent was permitted to file a statement of its position as to the trains covered by the complaint as amended, and a further hearing was had in Port Jervis January 12, 1912.

The trains in question are therefore trains leaving Port Jervis eastbound, No. 170 at 6:13 a. m., and No. 178 at 7 p. m.; and the westbound train No. 179 arriving at Port Jervis 4:38 p. m.

Graham is the first station east of Port Jervis.

Leaving out of view the Pine Island branch, train No. 170, leaving Port Jervis at 6:13 a. m., is the only train connecting with the morning trains on the various Erie railroad branches, and is therefore the only train by which passengers using the Graham station could make connection for points on such branch lines, including Newburgh, a principal trading center, and where a large part of the court business of

the County of Orange is transacted. The next train, No. 172, leaving Port Jervis passes Graham at 7:55 a. m. under the present schedule, but it passes the junctions of the branch lines after the morning branch line trains have departed.

The Middletown and Crawford branch train leaves Middletown at 7:50 a. m. Main line train No. 170 arrives at Middletown 6:54 a. m., and No. 172 arrives at Middletown 8:19 a. m. The next train out of Middletown on the branch leaves at 11:38 a. m.

The New York, Susquehanna and Western (a part of the Erie system) runs its morning train out of Middletown at 7 a. m. No. 170 from Port Jervis would connect at Middletown for this train at 6:54 a. m. The next train on the Susquehanna and Western line leaves Middletown at 3:10 p. m.

A Montgomery branch morning train leaves Goshen at 7:15 a. m. No. 170 Erie main line train reaches Goshen at 7:09 a. m.; the next Montgomery branch train at 11:27 a. m.

The Newburgh branch via Greycourt morning train leaves Greycourt 7:45 a. m. No. 170 main line train reaches Greycourt 7:22 a. m. The next train out on this branch leaves Greycourt at 11:40 a. m.

The Newburgh branch via Harriman morning train leaves at 7:28 a. m., before main line No. 170 arrives at Harriman (7:37 a. m.), but passengers by No. 170 for Newburgh would go via the branch from Greycourt. The next train from Harriman for Newburgh leaves at 11 a. m.

While not many passengers ride to and from Graham, it is apparent that those who do have occasion to reach points on these branches, including Newburgh, in time to do legal and other business, are entirely shut off from any morning service to these points. If such passengers do take the 7:55 a. m. train from Graham, they must wait at the branch line junction about two or more hours. The returning trains are so arranged that they must reach Graham at 2:17 in the afternoon or 7:21 in the evening.

By the main line No. 170 the Graham passenger could reach Newburgh at 8:30 a. m., and if his business is concluded he could return by the 12:27 p. m. train from Newburgh and reach Graham at 2:17 p. m. The present train service compels him to wait for the evening train arriving at Graham 7:21 p. m. It is not necessary to multiply examples applying on the other branches.

It seems clear that the withdrawal of this train stop for train No. 170 seriously prejudices those who have occasion to use the Graham station in traveling locally. Incidentally, it is to be observed that this train reaches New York at 9:35 a. m., while train No. 172, the one leaving Graham at 7:55 a. m., does not reach New York until 10:55 a. m. This train No. 170 is a local train leaving Port Jervis at 6:13 a. m. It makes all stops shown in the published time schedule until it reaches Harriman, except Oxford and Graham. Oxford is served by an earlier train from Middletown. Train 170 below Harriman stops only at Suffern, Paterson, and Passaic. It serves commuters to a considerable extent and it is necessary that its time should be observed. If the restoration of the service by this train for Graham interferes necessarily with the time of the train, it can be made to run two or three minutes earlier from Port Jervis.

Eastbound train No. 178 is a local train from Port Jervis. It is the only train passing Graham eastbound after 3:42 p. m. except the Erie fast express train No. 2. It would serve Graham passengers who go to Port Jervis in the afternoon by the 2:17 train from Graham, or by the train reaching Port Jervis at 4:38 p. m. if that train should be required to stop at Graham. The distance between Graham and Port Jervis is eight miles. A passenger from Graham taking 2:17 p. m. train for Port Jervis arrives there at 2:32 p. m. He must do his business in a hurry to catch the returning train to Graham at 3:26 p. m. If he does not, he must stay in Port Jervis over night or reach

home by some means other than the Erie train service. His only other recourse is to take the 7:39 a. m. or 10:54 a. m. train from Graham and be ready to return at 3:26 p. m. from Port Jervis, arriving at Graham at 3:42 p. m. For persons having business or daily work in Port Jervis, the existing service from Port Jervis to Graham ends with the train leaving Port Jervis at 3:26 p. m. One witness in this case who lives at Graham but whose business is in Port Jervis is compelled by existing train conditions to board during the week in Port Jervis. If train No. 178 from Port Jervis at 7 p. m. were stopped at Graham, this passenger could and would travel daily between the two places. That the stopping of this train is necessary to adequate service between Graham and Port Jervis is apparent, and this train stop should be restored. This train handles express largely on its run to New York and respondent claims it has great difficulty in making its time. The fact that the train is a local, instead of a through train, starting from Port Jervis enables respondent to make the starting time at Port Jervis earlier by two or three minutes if that is actually necessary to the proper running and operation of the train.

Train No. 179 runs as a local train from New York to Port Jervis. It makes all stations north of Hohokus except Graham. South of Hohokus it stops at Ridgewood, River street, Paterson, Passaic, and Rutherford. There is no reason why this train should not stop at Graham when necessary to accommodate passengers. Its time between Jersey City and Port Jervis is 3 hours and 23 minutes, for a distance of 88 miles. Its arrival time in Port Jervis is 22 minutes ahead of No. 27, a train which ends its run at Binghamton and runs as a local for nearly all stations from Port Jervis. Graham passengers from Goshen, Middletown, and other points would be benefited by this train facility. School children could use it from Middletown. Farmers living in the vicinity of Graham could get back to their homes in time for evening work instead of waiting

for the night train which arrives there at 7:21 p. m. Now they must get back on the 2:17 p. m. train at Graham or wait for the 7:21 p. m. Train No. 170 consumes 2 hours and 49 minutes, and train No. 178, 3 hours and 10 minutes, between Port Jervis and Jersey City; and train No. 179 takes 3 hours and 23 minutes from Jersey City to Port Jervis. As stated, this distance is 88 miles. The running time is from 26 to $31\frac{1}{4}$ miles an hour.

This is not a complaint which asks that a new train be put in service, and where a reasonable amount of patronage should be shown; nor does it rest upon a demand for the establishment of a new station, or for the stoppage of trains which have not been stopped there in the past. It is a case where these local or short distance trains put on primarily to serve the local public run every day past the Graham station, and which trains or those having corresponding times at Graham have served that station for a long period of years prior to the time when for some purely company reason the Graham stops were discontinued. The respondent shows a conductor's count of the patronage of these trains taken for a period of 9 days during the last of January and in early February, 1911. This is in a season of lightest travel. According to that count so taken train No. 170 had 3 passengers, train No. 178 had 7 passengers, and train No. 179 had 9 passengers. Complainants claim that the count can not represent the average travel to and from Graham during the year, and it is evident that such claim must be held sustained. The spring and fall and summer travel are there wholly ignored. But it is not conclusive in this case whether the travel to and from Graham be small or considerable. These trains running over a line of railway as local trains between Port Jervis and points south apparently would serve and should be operated to serve that part of the public desiring to patronize the railway at Graham, a long established station upon that line. There is no showing that the population in the vicinity of Graham has so greatly

diminished that there is no real occasion for these train stops. On the contrary, part of the region about Graham is being settled by residents from the city who have built or purchased country homes. The railroad company is entitled, however, to fair opportunity for showing that the patronage of these trains or any of them is so insignificant during a considerable period of time that no reasonable basis exists for subjecting it to the small expense or the inconvenience of stopping any or all of these trains upon signal. As this Commission has held in other cases, such showing should be based upon an actual record of the passengers using each train each day, both for the purpose of boarding or alighting therefrom, at the station in question during a stated period of time. We think in this case that such record should be kept for a period of at least six months.

An order should be entered requiring the Erie Railroad Company to restore the stops of said trains Nos. 170, 178, and 179 at Graham, N. Y., and to continue said stops, in force from March 1, 1912, until the said order shall be modified, superseded, or abrogated by the Commission; provided, however, that the said trains shall not be required to stop at Graham aforesaid except on station signal for passengers to board, or on notice to the conductor for passengers to depart from, said trains. The order should further provide that the company may keep for each of such trains a record of the number of passengers who take passage upon or leave the same at Graham station during the period of six months from March 1, 1912, or for such longer period as it may deem proper, and present such record to the Commission, together with a petition for abrogation or modification of the order.

In the Matter of the Complaint of the BOARD OF TRADE OF MONROE, Orange County, *against* ERIE RAILROAD COMPANY, requesting a new freight and passenger station at Monroe.

In a proceeding brought under section 50 of the Public Service Commissions Law wherein it is demanded that a railroad company furnish better station facilities and wherein the railroad company admits the insufficiency of its facilities and offers to construct new ones, the function of the Commission is to determine whether the facilities finally offered by the railroad company are adequate.

Section 50 does not in such a case confer upon the Commission power to disapprove of a site and building offered by the railroad company which is in the opinion of the Commission adequate, and to direct the railroad company to locate its station at another site which is claimed to be more advantageous than the site selected by the railroad company. The Commission is charged with the duty of seeing that a railroad company furnishes station facilities which are amply adequate, convenient, and proper, from a sanitary and operating point of view, to handle the traffic at any place where a station is located. The railroad company in the first instance must be the judge as to what is proper both from the standpoint of its own interest and from the standpoint of its view of what the public interests demand.

If after examination and the taking of testimony the Commission is of the opinion that the facilities thus offered adequately meet the demands, the mere fact that there is another site which is claimed to be a better one ought not to be made the basis of an order directing its selection. The merits of such a location may properly be presented to the railroad company for its careful consideration, but the choice should ultimately be left to it, provided no conditions are found in the site finally presented which render it inadequate or unfit.

A station site is not adequate to which ample access may not be had by public highways.

Conditions in the case of the station at Monroe fully stated.

Submitted February 6, 1912. Decided February 15, 1912.

Frank F. Griffin, President of the Village; *Z. Paddleford* and others, as members of the Executive Committee of the

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Board of Trade of Monroe, N. Y.; *E. C. Smith*, Monroe, N. Y., for the complainant.

M. N. Kane, Warwick, N. Y., for Gilbert Carpenter of the village of Monroe, N. Y.

T. H. Burgess, 50 Church street, New York city, for the respondent.

OLMSTED, Commissioner:

The Board of Trade of the Village of Monroe, N. Y., on its own behalf and in behalf of the citizens of the village, made complaint against the Erie Railroad Company regarding station facilities at the village of Monroe, and stated that they were unsanitary, unsightly, and inadequate. The complaint goes into details on these points, and concludes as follows:

In view of the conditions existing here at Monroe as set forth in this complaint, we believe the only remedy possible is the erection of a new, more commodious and sanitary station upon a larger site, either the present one enlarged or an entirely different one. We therefore respectfully petition your honorable Commission to take such measures as are necessary to bring the relief sought.

In answer to this complaint the Erie Railroad Company stated as follows:

New York, June 12, 1911.

Secretary to the Public Service Commission:

In reply to this complaint I would advise that the company will build a suitable station at Monroe. We are unable at this time to make any more definite statement as we have been unable to secure property upon which to locate the station. A copy of this letter has been sent to *E. F. Eichenberg*, Secretary Monroe Board of Trade, Monroe, Orange County, N. Y.

Yours very truly,

H. A. TAYLOR,
General Solicitor.

On September 14, 1911, a hearing herein was held at Albany at which time the representatives of the railroad stated that it intended to build a new station, that its plans therefor were not fully completed but would be within a short time. A general lay-out of the proposed station was

presented, and the railroad company stated that it intended to locate the same on the Carpenter property, so called.

It appeared on this hearing that there was some objection on the part of residents of Monroe to the location of the station on the Carpenter site. An adjournment was taken to the village of Monroe, where a hearing was held on the 27th day of September, 1911. At this hearing it was shown that the Erie railroad does not at the present time own the land or building at the village of Monroe which it uses for station purposes, but that it rents the same from a private owner; that in accordance with its statement made at the hearing in Albany the agents of the company had secured options for a station site consisting of a triangular piece of land of approximately 0.63 acre in area located on Carpenter place in the village of Monroe. This site is about 650 feet distant, measuring along the track, from the present building used as a station located near the junction of Main and Lake streets. The distance by the usually traveled highway from the present station to the proposed station is about one-half mile. Representatives of the railroad company stated at this hearing that they were prepared to erect a building on this site to be used as a freight and passenger station, at an estimated expenditure of about \$12,000. The railroad company also stated that it had secured land for a team track located about 600 feet to the east of the station site, and that a team track was under way and partly constructed at that time.

At the hearing at Monroe a large number of citizens were present. The village president and some of the trustees of the Village, and members of the Board of Trade appeared before the Commission and stated that they desired the railroad company to locate its proposed new station at a point near the present building used as a station. It was shown that a resolution had been passed by the board of trustees of the Village calling for a special election to determine whether the Village would bond itself for the purpose of purchasing land for a park to be used in connection with the station building. The plans for the location of the station at this

point — which may be called the Main Street site as distinguished from the Carpenter site — were not fully developed.

It was stated by the Commissioner who held the hearing that a more definite plan should be presented to the railroad company, and time was given therefor.

Since the hearing at Monroe a number of citizens of the village have combined into what is intended to become an incorporated company for the purpose of securing a station at the Main Street site. It is stated that twenty-six people have subscribed for stock in the company, options on land have been secured, and a plan contemplating a plaza and a new lay-out of tracks near the station has been presented to the Commission and also to the railroad company. The committee has proposed to the railroad company to furnish it free of expense with a plot of land for station purposes. The railroad company has advised the Commission in a letter signed by J. C. Stuart, its vice-president, under date of October 17, 1911, that it is unwilling to accept the proposals of the citizens committee and desires to locate its station on the Carpenter site.

Concerning the Carpenter site, the counsel representing the railroad company stated on the hearing as follows: "There were at least two or three other sites that were considered, and this site was chosen from a practical operating standpoint as being the best site in the village of Monroe to place a station."

The portion of the Public Service Commissions Law which is here invoked is section 50, which in so far as the same is applicable reads as follows:

Power of commissions to order repairs or charges. If in the judgment of the commission having jurisdiction, additional tracks, switches, terminals or terminal facilities, stations, motive power, or any other property, construction, apparatus, equipment, facilities or device for use by any common carrier, railroad corporation or street railroad corporation in or in connection with the transportation of passengers or property ought reasonably to be provided, or any repairs or improvements to or changes in any thereof in use ought reasonably to be made, or any additions or changes in construction should reason-

ably be made thereto in order to promote the security or convenience of the public or employees, or in order to secure adequate service or facilities for the transportation of passengers or property, the commission shall, after a hearing either on its own motion or after complaint, make and serve an order directing such repairs, improvements, changes or additions to be made within a reasonable time and in a manner to be specified therein, and every common carrier, railroad corporation and street railroad corporation is hereby required and directed to make all repairs, improvements, changes and additions required of it by any order of the commission served upon it . . .

It was apparently the view of the members of the Board of Trade and other citizens in favor of the Main Street site, as expressed at the hearing at Monroe, that the Commission has power under this section to determine where a railroad company shall locate its station; and it appeared to be the view of such citizens that this Commission can disapprove of a site chosen by the railroad company and direct the company to locate at another site if in its opinion the site last named is more advantageous than the site selected by the railroad company.

In the opinion of the Commission, section 50 does not confer upon it powers so broad as those contended for by the complainants. The Commission is charged with the duty of seeing that a railroad company furnishes station facilities which are amply adequate, convenient, and proper from a sanitary and operating point of view to handle the traffic at any place where a station is located.

The railroad company in the first instance must be the judge as to what is proper both from the standpoint of its own interest and from the standpoint of its view of what the public necessities demand.

If after examination and the taking of testimony the Commission is of the opinion that the facilities thus offered adequately meet the demands, the mere fact that there is another site which is claimed to be a better one ought not to be made the basis of an order directing its selection. The merits of such a location may properly be presented to the railroad company for its careful consideration, but the choice

should ultimately be left free to it, provided no conditions are found in the site finally presented which render it inadequate or unfit.

This view of the powers delegated to the Commission was fully set forth by the Commissioner presiding at the hearing at Monroe, and the complainants were asked to point out clearly any feature or condition in the plan proposed by the railroad company which made it inadequate or unsuitable. The objections raised are as follows:

First, That the Carpenter site is located on a street which is not a public highway;

Second, That the location of the station at that site will detract from the value of the business property now located on streets in the immediate vicinity of the present site;

Third, That the construction of a station at Carpenter place will interfere with future plans for eliminating the grade crossing now existing at Main street;

Fourth, That the majority of the people of the village of Monroe have no convenient access to the Carpenter site.

In discussing these objections it is necessary to give briefly the local conditions at Monroe village. The Erie railroad runs northeasterly and southwesterly through the village, dividing it into northerly and southerly sections. The proposed site is located on Carpenter place at its intersection with the Erie tracks, at a point about 650 feet easterly, measuring along the tracks, from the present station. It is situated on the southerly side of the tracks. The business center of the town is practically at the present station. To reach the proposed station from the business center, one must travel southerly along South Main street to its intersection with Maple avenue, thence easterly along Maple avenue to Carpenter place, thence northerly along Carpenter place to the station site, a total distance of half a mile; or one may go from the business center northerly, crossing the tracks of the railroad at Main street, to Spring street which comes into Main street just northerly of the tracks, thence easterly on Spring street to Carpenter place.

thence southerly along Carpenter place and passing under the railroad tracks through an opening which will be later described to the proposed site, a total distance of about 750 feet; or he may continue along Spring street (passing Carpenter place) to Maple avenue into which Spring street runs, thence westerly along Maple avenue to Carpenter place, thence northerly along Carpenter place to the proposed site, a total distance of two-thirds of a mile from the business center of the village. In using this latter route, one must cross the railroad tracks twice, once at Main street and again at Boyd's crossing (so called) on Maple avenue. Both of these are grade crossings. Carpenter place extends from Maple avenue on the south to Spring street on the north. It is laid out as a fifty-foot street, and passes under the railroad tracks through a cattle-pass which was awarded to Benjamin R. Andrews or Joseph R. Andrews in a condemnation proceeding brought by the New York, Lake Erie and Western Railroad Company against said parties. In that proceeding the commissioner of condemnation directed there should be erected and maintained a cattle-pass, eight feet in width and five feet in height, at a place to be designated and selected by him, to be used by himself and his heirs and assigns forever. Whatever rights in and to this cattle-pass or farm crossing were formerly possessed by B. R. and J. R. Andrews have now inured to Gilbert Carpenter, who is the grantor in the proposed deed of the station site. Gilbert Carpenter laid out the street known as Carpenter place. He states that for seventeen years it has been used as a public highway, and that as many as fifty vehicles a day have passed through the undercrossing. Although the height of the pass is named in the condemnation proceedings as five feet, its height as it actually exists is about eight feet. Carpenter has sold two lots on the street and has deeded another to his son. Each of the deeds runs to the center of the street. Carpenter now owns all the remaining land on the street. He has offered the street to the Village as a public street.

it has never been accepted. He stated at the hearing at Monroe that the offer was still open, and that he would deed it to the Village without conditions and without expense at any time that the Village would accept it. It was stated as a reason for the non-acceptance of the street by the Village that it was not fifty feet wide throughout its entire length, being narrowed down to eight feet at the cattle-pass. Although the deed or proposed deed by Carpenter to the railroad company of the station site was not produced in evidence, it was stated that it did not contain a right of way through Carpenter place. On this point Mr. Carpenter stated on the hearing:

About three or four years ago I wrote to the Erie Railroad Company that a site for a depot, if acceptable to them, would be given down about the site where they have now proposed to build it. Nothing was ever done about it, and no communication was ever received from the company until this matter of a new station at Monroe came up, and then I renewed the proposition, offering them the site that they have now bought for a station for the construction of a depot. I also have offered the right of way, and stand ready to give the right of way through Carpenter place on both sides of the railroad; and I also own the right to the use of the land under the culvert, and that I have offered to them.

It also appeared upon the hearing that Mr. Carpenter is in a position as trustee of the Kumpfer estate to provide a right of way for a new street which might be opened by the Village from South Main street easterly to a point on Carpenter place directly opposite the proposed station site. On this point Mr. Carpenter's statement is as follows:

I also offered to sell to the Village of Monroe, at a consideration not to exceed a thousand dollars, the right of way for a street through the Kumpfer property connecting Main street with the new depot proposed, a distance of not to exceed 350 feet.

Q. Now, the Kumpfer property does not reach this depot property, does it?

A. No, sir.

Q. There is a piece of land in the rear owned by David F. Mack?

A. Yes, sir.

Q. I understand that Mr. Mack has tendered a right of way over that?

A. He has told me that whenever the Village would put that street through he would give the right of way.

Mr. Griffin, president of the Village, testified that in his opinion the expense of constructing a street and sidewalks over this property would be from \$500 to \$800. It thus appears that by the opening of a new street at an expense of approximately \$1800 the proposed station could be reached from the business center of the village by a direct route. The distance by this route from the business center along South Main street to the new street is approximately 200 feet, from South Main street along the proposed new street to the proposed station site 400 feet, making 600 feet in all; thus bringing the proposed site within 600 feet by a direct route from the business center of the village.

It is true that the location of the station at Carpenter place might depreciate somewhat for business purposes the value of property now located near the present station. Such a result is, however, problematical. There are no business places at the present time in the immediate vicinity of the proposed station. It is a residential part of the village, and it is not likely that business will be diverted to any great extent from the section where it is now established. Common experience teaches that trade centers remain, and numberless instances could be cited to show that the location of a new station in communities has in no appreciable degree affected the districts where business is done. Even if the contention were true, its consideration ought not to weigh in determining this case, for the needs of the traveling public rather than the interests of business should govern the decision.

The Commission has given much study to the effect of the location of the station at the proposed site upon an elimination of the crossing at Main street. An examination of the location was made by a Commissioner personally, and the

Commission's engineer of grade crossings has inspected the ground. In the construction of the proposed new station and facilities the grade of existing tracks will not be materially changed, but the grade of the tracks will be so established at Carpenter place that it will become a matter of considerable expense to raise or lower it at Main street, 600 feet away, should that course become necessary as a part of any future elimination at Main street. In the planning and construction of a station at Carpenter place the future elimination at Main street should be kept in mind and grades adopted which will as far as possible facilitate that elimination.

No figures have been submitted of the cost of the elimination at Main street, but it is apparent that it will be very expensive (probably upward of \$100,000). On account of the expense involved, it is not likely that the work will be undertaken in the immediate future, and the erection of a new station ought not to wait upon a condition so indefinite as that presented by the Main Street elimination. The people of Monroe desire the question decided now. The enlargement of the cattle-pass at Carpenter place, both as to width and height, is desirable in case the station is built at the proposed site, and this improvement would undoubtedly soon follow such action. Apparently the Village must take the initiative by accepting the street known as Carpenter place, and taking the statutory steps to carry it under the railroad tracks at a width of fifty feet. The probable expense of carrying it under in this manner, with proper headroom, has been estimated by the Commission's engineer to be approximately \$12,000. In a proceeding brought under section 90 of the Railroad Law, one-half of this expense would be borne by the railroad company and one-half by the Village.

The Commission has, in this proceeding, no jurisdiction over the matter of widening the cattle-pass, except that it might say that the proposed station site is not adequate

unless this improvement is made by the railroad company at this time. To do this would be to put the entire expense of widening and raising the crossing upon the railroad company, and in the judgment of the Commission such a determination is not warranted by the facts as disclosed.

It is apparent that the change in station site will take away from the present dangerous grade crossing at Main street a number of vehicles and people now brought there by the present station. To that extent it will relieve conditions at Main street and render the crossing there less dangerous.

The village has a normal population of about 1000, which is nearly doubled in the summer time. It is difficult to determine whether the change in sites would inconvenience more people than it would convenience. Those people living on the south side of the tracks and easterly of Main street are as a rule much nearer to the proposed station. Those on the north side of the town can reach the new site by going through the cattle-pass with very little addition to the present distance traveled, and with the added protection of an undercrossing instead of a grade crossing. The business portion of the town would be at present inconvenienced, but by the laying out of the new highway above described the business section can be brought within 600 feet of the new station. When that is done, it is the opinion of the Commission that about as many people will be inconvenienced by the new station as by the present one; and with no grade crossing at the new site their safety is much better cared for.

With the foregoing facts before it the Commission gave careful consideration to the proposition made by the railroad company, and on the 7th day of December, 1911, it addressed a letter to Mr. T. H. Burgess, the attorney for the Erie Railroad Company, written by Commissioner Olmsted, which contained among other matters the following statement:

I am directed to say that the Commission will approve of the site upon two conditions: First, you are aware that Carpenter place is not

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at the present time a public highway. The Commission desires a stipulation filed with it binding the Erie Railroad Company to keep Carpenter place from Maple avenue to the railroad company's right of way line open and in a passable condition so long as it remains a private thoroughfare. If later on the Town shall take it over as a public street, this obligation would no longer rest upon the railroad company. Second, that the Erie Railroad Company open and dedicate to the Village of Monroe a street running from a point in South Main street approximately 200 feet southerly from the present station through the Kumpfer property to Carpenter place, in front of the proposed station. . . . I am directed to say, that upon filing with the Commission such stipulation the Carpenter site, so called, will be approved as adequate.

The word "passable" in the foregoing letter is to be construed to mean in good condition and proper for public travel, and it is perhaps better that these words be incorporated in the stipulation instead of the word "passable".

In reply to this letter the Commission received from the Erie Railroad Company the following letter under date of January 31, 1912:

Referring to your letter of December 7th, to Mr. Burgess, in regard to the Monroe station matter, Case 2320, I would advise that the company is ready to build a station on the Carpenter site, and to open or cause to be opened and dedicated to the Village a street running from South Main street to the proposed station site; and it will also agree that the private street, known as Carpenter place, running from the proposed station site to Maple avenue, shall be kept open as a means of access to the station. The company does not, however, feel that it should be called upon to maintain the proposed street from Main street to the station site as well as Carpenter place indefinitely, and the Village authorities at present show no inclination to accept dedication of either street. The company, therefore, does not feel inclined to acquiesce in the proposition contained in your letter of December 7th without some assurance that these streets which will be in fact largely used by the public, will be accepted by the Village as public streets after they have been opened and dedicated, and thereafter maintained by the Village as public streets.

(Signed) H. A. TAYLOR,
Asst. Gen. Solicitor.

On receipt of this letter, a letter was written under date of February 1, 1912, to James R. Sutherland, President of

the Monroe Board of Trade, the petitioner in this case, of which the following is a copy:

In my letter to you of December 21, 1911, relative to the Erie railroad station at Monroe, I advised you that some inquiries had been addressed to the Erie Railroad which had not at that time been answered. The Commission is now able to give definite reply to your letter.

On the 7th of December, 1911, a letter was addressed to T. H. Burgess, attorney for the Erie Railroad Company, of which a copy is inclosed. The letter explains itself. On the 31st of January the Erie Railroad Company made answer to this letter through Mr. H. A. Taylor, its assistant general solicitor. A copy of his letter is also inclosed.

As the matter now presents itself, the Erie Railroad offers: (1) To put a station at Carpenter place; (2) to keep in passable condition that part of the private street known as Carpenter place between the proposed station and Maple avenue until such time as the street shall be accepted by the Village; (3) to open and dedicate to the Village a new street running from a point in South Main street approximately 200 feet southerly from the present Erie station through the Kumpfer property to Carpenter place, in front of the proposed station.

But you will note that the Erie Railroad Company declines to assume the responsibility for maintaining this street indefinitely. The exact location of this new street is not given but you are aware of its approximate location, and it could easily be staked out as proposed by the officials of the Erie Railroad, Mr. Carpenter, and someone representing the Village Board.

The Commission is of the opinion that the Village should accept the street when opened, constructed, and dedicated to it by the Erie Railroad Company; and further, that inasmuch as this new street will provide with Carpenter place a complete thoroughfare from South Main street at one end to Maple avenue on the other, that the Village should also accept Carpenter place from Maple avenue to the cattle-pass, providing Mr. Carpenter is willing to dedicate and convey that part of it to the Village. The Commission is not prepared to ask the Village to accept that part of Carpenter place which passes under the cattle-pass and through to Spring street, but it is of the opinion that where highways leading to the new proposed station have been constructed and dedicated to the Village, so as to give a means of approach from the business section at South Main street and from the resident section from Maple avenue, that the Village should accept them and maintain them as public highways, for it is

apparent that as soon as a new station is constructed at Carpenter place these highways will become as important as any in the village.

Will you therefore take up with the Village trustees the question of accepting these highways as dedicated; and on filing with the Commission a statement or resolution of the Village board that these highways will be accepted by them, the Commission will be prepared to make an order directing the Erie Railroad Company, on the conditions named, to construct a new station at Carpenter place. I trust the Commission may hear from you very shortly.

(Signed) J. B. OLMSTED,
Commissioner.

In reply to the last named letter the Commission has received from James R. Sutherland, President of the Board of Trade of the Village of Monroe, petitioner in the case, the following letter dated February 6, 1912:

In pursuance to your request of February 1st I appeared before the Village Board of Trustees of Monroe and read your communication regarding the acceptance of streets to lead to new station.

Five members constitute the Village board: One was absent; one did not vote; three voted not to accept any new streets.

If there is anything the Board of Trade can do to facilitate matters I would be greatly obliged for your advice.

(Signed) JAS. R. SUTHERLAND.

In the opinion of the Commission the position taken by the trustees of the Village of Monroe is unreasonable. The view of the Commission on this matter was quite fully stated by Chairman Stevens on the hearing held at Albany on the 14th of September, 1911. At that hearing the chairman stated, addressing himself to the representatives of the Board of Trade of Monroe who appeared at the hearing:

Now, you gentlemen better consider in this matter, that if the Erie Railroad Company is putting up a new station at a cost of \$16,000, whether it is not for the Village to do something in the way of providing proper approaches to get to it. I do not say you should do anything. I simply say you ought to consider the matter as a fair proposition in a reasonable consideration of the case.

The proposition of the Erie Railroad as made does not contemplate the immediate expenditure of any sum of money on the part of the Village of Monroe. It contemplates simply

the maintenance of that part of the highway now known as Carpenter place running from Maple avenue up to the southerly right of way line of the Erie Railroad Company, and of another highway to be opened from that point through to South Main street. It is apparent that as soon as the new station is constructed upon the Carpenter site these highways will become avenues of much importance to the village. Taken together they will form practically one street, and will afford an approach to the station from the business center on South Main street and also from the southern residence section of the village from Maple avenue. It is not unreasonable that the Village should be required to accept the streets as indicated and assume the maintenance of them.

Since the submission of this case the Commission has received a number of letters written by residents of the village of Monroe indicating their preference for the Main Street site. It appears to be the view of the writers of these letters that the Commission has power to determine in this case whether the Railroad should locate its station on the Main Street site or upon the Carpenter site. In answer to such communications it is sufficient to refer to what has been said in the first part of this memorandum concerning the powers of the Commission in that regard.

It is the opinion of the Commission that if the Village authorities persist in the position they have taken as outlined in the letter of James R. Sutherland dated February 6, 1912, above quoted, the case should be closed upon the records of the Commission. A reasonable time should be granted to the Village for a careful consideration of the situation in the light of the facts as hereinbefore set forth. To that end an order should be entered directing that unless the Village authorities shall on or before the 1st day of April, 1912, comply with the suggestion of the Commission as outlined in its letter to James R. Sutherland dated February 1, 1912, and above set forth, and shall file with the Commission a statement or resolution of the Village board that the highways hereinbefore described will be accepted as pointed out in said

letter, then the petition shall be dismissed and the case finally closed upon the records of the Commission.

It is needless to point out the fact that if the respondent, the Erie Railroad Company, shall of its own motion adopt the Main Street site and present the same to the Commission as its choice of a station, in pursuance to its letter of June 12, 1911, hereinbefore set forth, a new situation would arise which would require further consideration. Up to the present time the respondent has not presented any other plan than the so called "Carpenter Site" plan, and in consequence no other plan has been carefully considered by the Commission. Should the Main Street plan or any other plan be presented by the Railroad company to the Commission, careful consideration would be given to the same; and the determination of the Commission as to its adequacy would be made upon the lines hereinbefore laid down.

In the Matter of the Application of ADIRONDACK ELECTRIC POWER CORPORATION to issue its capital stock to the amount of \$12,000,000, and its fifty-year gold bonds to the amount of \$5,000,000.

In cases of application by a corporation organized pursuant to section 9 of the Stock Corporation Law as reorganization of a corporation whose property has been sold on foreclosure or judicial sale, for authorization to issue stock and bonds in conformity with the terms of the plan or agreement for reorganization entered into pursuant to section 10 of the Stock Corporation Law, the powers of the Commission are limited by the decision of the Court of Appeals in the case *People ex rel. Third Avenue Railway Company vs. Public Service Commission for the First District of the State of New York*, 203 N. Y. 299.

Under that decision the Commission seems to have but two functions:

1. To determine whether the applicant is in fact a corporation duly incorporated pursuant to section 9 of the Stock Corporation Law;
2. To determine whether the securities required by the plan of reorganization are in excess of those of the company to whose property and franchises the applicant has succeeded.

The general object of section 9 of the Stock Corporation Law is to permit the reorganization of one corporation and not the consolidation of two or more distinct and unrelated corporations.

If, however, prior to the attempted reorganization there has been created a substantial business and material unity which can not be destroyed without material loss and injury to the parties interested in the corporations, that unity may be perpetuated in a reorganization.

Decided February 19, 1912.

Edgar T. Brackett, Charles H. Tyler, for applicant.

STEVENS, *Chairman*:

Adirondack Electric Power Corporation has filed its petition with this Commission, asking that pursuant to section 69 of the Public Service Commissions Law this Commission authorize it to issue twelve million dollars (\$12,000,000) of capital stock, divided into one hundred and twenty thou-

sand (120,000) shares, of which \$2,500,000, or 25,000 shares, shall be preferred stock, and \$9,500,000, or 95,000 shares, shall be common stock; and shall also authorize the issue by it of \$5,000,000 of fifty-year gold bonds bearing interest at 5 per cent.

It also has filed with its petition a certified copy of its certificate of incorporation, by which it appears that said certificate of incorporation was filed in the office of the Secretary of State of the State of New York on the 27th day of December, 1911, and in the office of the Clerk of the County of Saratoga on the same day. It further appears from said certificate of incorporation that said Adirondack Electric Power Corporation purports to be incorporated pursuant to the provisions of section 9 of the Stock Corporation Law, as a reorganization of the following domestic corporations of the State of New York: (1) Hudson River Water Power Company, (2) Hudson River Power Transmission Company, (3) Saratoga Gas, Electric Light and Power Company, (4) Hudson River Electric Company, (5) Hudson River Electric Power Company, (6) Madison County Gas and Electric Company, (7) Empire State Power Company.

Hearings were had upon the application on the 10th day of January and the 13th day of February, 1912, at which hearings both oral and documentary proofs were submitted by the applicant in support of the matters of fact open to inquiry by this Commission.

The first question for investigation in this case is what matters in it are open to our inquiry and decision. The Commission has uniformly held in reorganization cases that a reorganized corporation should come to us upon precisely the same footing as any other corporation in the matter of an issue of stocks and bonds. It has acted upon this principle in various cases with excellent results, uniformly holding that an issue of stocks and bonds must bear a proper relation to the value of the property for which they were issued.

This view of the law was overturned by the Court of Appeals in *People ex rel. Third Avenue Railway Company vs. Public Service Commission for the First District of the State of New York*, 203 N. Y. 299, decided November 21, 1911. In that case it was held to be necessary for a reorganized corporation to apply to the proper commission for authorization to issue stocks and bonds pursuant to the plan of reorganization. The court further held that in the case before the court the Public Service Commission for the First District was not justified in refusing the authorization applied for because the value of the mortgaged property and the amount of new capital to be invested were less than the amount of the securities to be issued by the corporation. As we read the decision, it was held that if the amount of capital, to wit stocks and bonds, fixed by the reorganization plan, was not inconsistent with the laws of the State, that such amount was binding upon the commission, and that the fact that the value of the property was less than the value of the securities proposed to be issued was a matter of no consequence. The commission in that case was in effect required to authorize the issuance of stocks and bonds to an amount very largely in excess, according to its finding, of the value of the property involved and the amount of new capital to be brought into the concern.

We see no escape from the conclusion that this determination of the Court of Appeals is binding upon this Commission so far as the amount of the securities to be issued is concerned, and we are unable to perceive how it is possible for us to act in cases of corporations organized under section 9 of the Stock Corporation Law upon the rule which we have hitherto believed to be the correct one: that securities should not be issued except they bore a proper and definite relation to the value of the property which they represented.

The foregoing considerations have led us to inquire with particularity what our powers are in a case of this kind. We have been unable to discover that we have any power or function whatsoever except in two particulars. The first of

these is whether the applicant is, in fact, a corporation duly incorporated pursuant to the laws of the State under section 9 of the Stock Corporation Law and entitled to all the rights flowing from such incorporation. To that question we have addressed ourselves with great care. The articles of incorporation in effect purport to be a reorganization of seven corporations. It has been urged upon us that it is entirely permissible to allow a reorganization of two or more corporations into one pursuant to the provisions of section 9. The basis for this contention upon the part of the applicant is found in section 35 of chapter 22 of the Consolidated Laws, reading as follows: "Words in the singular number include the plural and in the plural number include the singular." Counsel have submitted an elaborate brief in support of this contention. We are, however, unable to agree with the conclusion which they reach. It is our opinion that distinct and unrelated corporations are not covered by the provisions of section 9 to the extent that they may reorganize into one corporation. Section 110 of chapter 22 of the Consolidated Laws, being part of the chapter in which section 35 hereinbefore quoted is a part, reads as follows: "This chapter is applicable to every statute unless its general object or the context of the language construed, or other provisions of law indicate that a different meaning or application was intended from that required to be given by this chapter."

It seems to us clear that the general object of section 9 is to permit the reorganization of one corporation and not the consolidation of two or more corporations under the guise of a reorganization. This much should be stated clearly in order to avoid any possible question as to the position of this Commission in future cases which may arise.

This consideration, however, does not dispose of the case. Two corporations may have become in some manner so unified and interrelated as to make it impossible that there should be any reorganization of each separate corporation. If prior to the attempted reorganization there has been cre-

ated a substantial business and material unity which can not be destroyed without material loss and injury to the parties interested in the corporations, that unity may, in our judgment, be perpetuated by a reorganization, since there is no other way in which the parties interested can avail themselves of the benefit of the statute. In such a case, although the corporations may be distinct legal entities, the general object of the statute can only be attained by considering the words of section 9 in the plural, as is permitted by section 35. It is only just that parties interested in insolvent corporations should have the benefit of the reorganization provision of the statute; and where it is impossible to have such benefit except by reorganizing two or more legally distinct corporations into one, the words of the statute, in our judgment, should be construed in the plural as well as in the singular. It is in this way that the just and beneficial spirit of the statute is preserved.

Applying this principle to the case before us, we find that by a decision of the United States Circuit Court six of the corporations involved have been treated as in effect one. The court has refused to separate them, and has ordered the property of the entire six to be sold pursuant to the provisions of one judgment as the property practically of one corporation. In the opinion of the United States District Judge rendered upon ordering the decree pursuant to which those properties were sold, in July, 1911, we find the following language:

As stated, for some years the plants were run as one concern under one management. The earnings of all the companies were massed and used for the benefit of all. Money borrowed and property and supplies purchased were used for the benefit of all. The proceeds of bonds sold went for the benefit of three or four of these corporations at least, and in some cases for the benefit of all. The same officers and the same employees in part did the work for all the companies. The Oneida plant was an exception in some respects. It is far from probable that it can ever be known what the equities are between these several corporations if torn apart, so to speak, and sold as separate concerns. Some, one at least, generate electricity and do

nothing else. Some generate electricity and manufacture gas and do nothing else; while some transmit, and others both generate and manufacture and transmit and sell. Connected and operated as one whole as a system, they are of great value. As single corporations, some would be of little value. If these corporate properties are separated, go apart, and efforts are made by litigation, as would be inevitable, to settle their rights as between themselves and then establish business relations, the litigations would be ruinous and well nigh endless.

This language seems to us to be just, and the facts seem to warrant the conclusion of the learned judge that the properties of six of the corporations should be treated as a whole and not torn apart to the injury of everybody interested therein. This language, however, applies to only six of the corporations and not to the Empire State Power Company, the property of which was not sold pursuant to a decree of the United States Circuit Court but upon a statutory foreclosure pursuant to a power of sale contained in the mortgage. It is unnecessary to detail the precise situation with reference to the Empire State Power Company. Being satisfied that a substantial unity of the property of this corporation with the properties of the other six was not established by the record of the judgment in the United States Circuit Court, which was introduced in evidence before us, we required from the applicant further proof as to the relation of the property of this company to the others; and without detailing that proof it is sufficient to say that it shows conclusively that the property of the Empire State Power Company was an essential part of the corporate system and that to tear it out from that connection and attempt to treat it separately would be of great injury to the creditors of the entire system.

We are inevitably led to the conclusion that a substantial unity existed between all the corporations attempted to be reorganized in business management and in physical relation, such as to justify us in saying, as the United States Court said, that they are to all practical intents and purposes one corporation although separate legal entities. We therefore

must hold that the applicant is lawfully incorporated under the provisions of section 9 of the Stock Corporation Law.

The second question in the case arises from a dictum of the Court of Appeals in the Third Avenue case. This dictum was not essential to the decision of that case, and seems to have been uttered as a precaution against a possible interpretation of the decision. We have been unable to discover any provision of the statute upon which it is based, but it being an expression of opinion of the court of last resort we have felt ourselves bound to treat it as binding upon us. This dictum is as follows:

We do not say that in the reorganization of a railroad the new corporation is authorized to issue securities in excess of those of the company to whose property and franchises it has succeeded and the new money that may be put in the enterprise. Such a plan would be plainly inconsistent with the spirit of the Public Service Commissions Law against the issue of "watered" stock or bonds, but, up to the limit we have named, the new corporation has the right to issue securities.

This Commission had supposed that the spirit of the Public Service Commissions Law was to prevent the issue of any watered stock or bonds. The limitation here is that the reorganizers of an insolvent corporation may water the stock and bonds up to the amount that the stock and bonds of the former corporations were watered, but no more. Why the line should be drawn at this point we do not understand; but it being drawn there it is our duty to enforce it. A careful examination of the facts discloses that there were outstanding of the seven corporations involved stocks and bonds amounting to \$27,289,000. A portion of these stocks and bonds was owned by one or more of the companies themselves, and there were outstanding in the hands of the public stocks and bonds to the amount of \$16,382,000. There may have been some doubt as to the validity of some of these stocks and bonds in the hands of the public, and we understand that contest was made in the United States Circuit Court upon that point. Such doubt, however, has been resolved by the court itself, which has adjudicated the

validity of all of the securities thus outstanding which are in any way questionable. Other stocks which were owned by some of the companies involved, and the validity of which does not appear to be open to question, are sufficient in amount to bring the aggregate of unquestionable securities above \$17,000,000, and this exclusive of any new money which it may be proposed to put into the reorganized corporation. We therefore must find as a matter of fact that the applicant has brought itself within the provisions of the dictum above cited. We know of no other question in the case upon which we are at liberty to pass. We have not found ourselves able to inquire into the value of the properties involved by reason of the decision in the Third Avenue case. No evidence has been submitted to us concerning the value of such properties. We are entirely unable to say what such value is, and it is but just to the Commission that it should be of record that it makes the decision in this case, authorizing the capitalization proposed by the plan of reorganization, without reference to the value of the properties to be taken over by the new corporation, solely because the law as interpreted by the Court of Appeals compels us to make such decision.

In the Matter of the Complaint of the TOWN BOARD OF NEWSTEAD AND PRESIDENT AND BOARD OF TRUSTEES OF THE VILLAGE OF AKRON *against* THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY as to reconstruction of Buell Street overhead bridge crossing in said village.

The former Board of Railroad Commissioners, in 1899, ordered the elimination of a grade highway crossing over a steam railroad and directed that the highway be carried over the railroad tracks upon a wooden bridge. The bridge was constructed in conformity to the terms of the order, accepted by the Board, and paid for as required by statute. It was opened to traffic in November, 1900, and has been in use since that time. The railroad company is ready to maintain the bridge as required by law. The bridge, however, has become inadequate in size and strength to carry existing traffic.

Held, That this Commission has no power to order the demolition of the existing bridge and the construction of a new steel bridge of larger dimensions.

Decided March 8, 1912.

James E. Paxon for complainants.

Alfred Becker for respondent.

STEVENS, *Chairman*:

The village of Akron is situate within the limits of the town of Newstead, in the county of Erie. Along the boundary line between the village and the township extends a public highway known as Buell street, the boundary line being the center line of the street. Upon Buell street there is a highway bridge crossing the tracks of the New York Central and Hudson River railroad. This bridge was constructed pursuant to a determination of the Board of Railroad Commissioners made on the 16th day of August, 1899, pursuant to the provisions of then section 62 of the Railroad Law.

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eliminating a highway grade crossing at this point. The bridge was completed and opened for traffic on or about the 1st day of November, 1900, was accepted by the Board of Railroad Commissioners, was paid for in the manner prescribed by statute, and has been in continuous use since the day it was opened for that purpose. The bridge is a wooden bridge with bench resting upon concrete masonry piers, with approaches constructed of earth.

It is alleged that the bridge is now in an unsafe condition and ought to be replaced within a short time. Within the year last passed it has been determined by the State Highway Commission that Buell street at this point shall be improved as a county highway. All the necessary proceedings have been taken for that purpose, and the contract for the construction and improvement of this highway has been let and the work thereon has been commenced. The bridge now consists of a roadway sixteen feet in width.

The town board of the Town of Newstead and the village board of the Village of Akron petition this Commission for the entire reconstruction of the bridge upon a different plan from that adopted by the Board of Railroad Commissioners. They ask that it shall have a roadway twenty-four feet in width instead of sixteen feet as at present; that it shall be constructed of steel with a solid concrete floor instead of wood with a plank floor as at present; and that the grade of the approach to the bridge upon the north, which is now 7 per cent, be reduced.

The Railroad company is willing to make such repairs to the present bridge as will comply with the terms of the statute charging it with the maintenance thereof. This, however, is not acceptable to the petitioners. The difficulty is with the character of the structure rather than its present condition. A larger and stronger bridge is required at this place than was ordered by the Board of Railroad Commissioners, and the municipalities affected have thought that possibly this structure could be erected under the provisions of section 91 of the Railroad Law for the elimination of grade crossings.

The difficulty with this position is that the grade crossing was eliminated by an order of the Board of Railroad Commissioners: no grade crossing exists at this point, and hence the provisions of section 91 are wholly inapplicable to the case.

The question is, what power this Commission has to require an entirely new structure upon a different plan to be erected at this point. Obviously, we have no power to do this unless there is some specific provision of some statute conferring it upon us. Our attention has not been called to any such statute nor have we been able to find any.

It is urged upon us that it might be possible to reopen the decision of the Board of Railroad Commissioners and make a new decision therein. This argument proceeds upon the assumption that all determinations of the Board of Railroad Commissioners are open to review by this Commission. This Commission does not have such power. The only provision which can be invoked in such a case is the last sentence of section 125 of the Public Service Commissions Law, reading as follows:

Any investigation, examination or proceeding undertaken, commenced or instituted by the said boards or commission or either of them prior to July first, nineteen hundred and seven, may be conducted and continued to a final determination by the proper public service commission in the same manner, under the same terms and conditions, and with the same effect as though such boards or commission had not been abolished.

This provision very clearly refers to cases which were pending and undetermined on July 1, 1907. It can not be justly construed to apply to a case which had been brought to a final determination seven years before that date in which the bridge had been accepted and the rights of the parties fixed and determined by an order of the Board of Railroad Commissioners. The expenditure incurred in erecting the bridge was paid in accordance with the provisions of the statute many years since. To make another determination requiring an expenditure for a new structure under this section would be a clear perversion of its terms.

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The theory of the grade crossing elimination law as it now stands seems to be that when a structure is once ordered for the purpose of an elimination, that identical structure shall forever remain, being maintained in proper condition, however, by the Railroad company. There is an obvious defect in the law in cases where the growth of traffic has made the structure once ordered inadequate and insufficient to accommodate the public travel. This should be corrected by legislation, but it is obvious that we can now make no enforceable order which would require anybody to pay the expense of carrying out its provisions.

To require the Railroad company to repair the existing bridge does not meet the situation.

This Commission, therefore, recommends proper legislation which will enable it to deal adequately with the situation herein presented.

In the Matter of the Petition of the PATCHOGUE ELECTRIC LIGHT COMPANY under section 68 of the Public Service Commissions Law for permission to begin construction in a portion of the town of Southampton, Suffolk county, of poles, wires, and fixtures for transmitting and furnishing to the public electricity for light, heat, or power, and for approval of the exercise of a franchise therefor received by said company from the town board and town superintendent of highways of said Town.

The Suffolk Light, Heat and Power Company operates under a franchise from the Town of Southampton granted in October, 1903, which it exercised in the eastern portion of said town before the Public Service Commissions Law was enacted. The town of Southampton is approximately twenty-five miles in length from east to west.

The Patchogue Electric Light Company, the petitioner, has also a franchise from said Town dated October 26, 1911, allowing it to serve a district two or three miles in width known as the Speonk or Eastport lighting district, at the extreme western end of the town. The petitioner in this proceeding asks leave to exercise said franchise.

The Suffolk company has at the present time no constructed line nearer than twelve miles from the territory sought to be occupied by the petitioner and has no investment whatsoever in that territory.

The Suffolk company requests that the petition be denied on the ground that it intends to construct its line to the Suffolk territory at some time in the future and supply electricity there under its franchise.

Held, That the Suffolk company has shown no good reason why the petition should be denied. The reason for refusing to one corporation permission to exercise a franchise to begin construction in a territory already occupied by another is to prevent duplication of plants and hurtful competition between the two companies, with the attendant ultimate cost to the public and the detriment to service which is likely to ensue where two companies are occupying a territory which is rich enough to support only one. These reasons are not present in this case.

It can not be said that the exercise of a franchise, although granted for a town at large and exercised in one part of it, necessarily preëmpts the territory in all other parts of the town to the extent of barring out all other lighting companies from exercising, in localities not actually occupied, franchises properly granted.

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No opinion is expressed as to whether the Suffolk company has or has not a right to exercise its franchise in the Speonk district.

The opinion of the Commission in the case of the application of the Islip Electric Light Company for permission to exercise franchises in the villages of Islip and East Islip, Suffolk county, decided May 5, 1910, confirmed.

Submitted February 3, 1912. Decided March 26, 1912.

Joseph T. Losee for petitioner.

Timothy A. Leary for the Suffolk Light, Heat and Power Company, in opposition.

OLMSTED, Commissioner:

The town of Southampton, in Suffolk county, is situated on the southerly side of Long Island and extends from east to west approximately twenty-five miles. Its population is located along the Long Island shore in what has been described in this proceeding as a fringe. The northern portions of the town are very sparsely inhabited. The incorporated village of Southampton is located in the eastern end of the town. The unincorporated village of Eastport is located at the extreme western end. The town of Southampton is adjoined by the town of Brookhaven on the west, and a part of the village of Eastport is situated in the town of Brookhaven and part of it in the town of Southampton. The population of that portion of Eastport situate in the town of Southampton is about five hundred. South of the village of Eastport, and about one and a-half to two miles therefrom, is located the unincorporated village of Speonk. (For the sake of convenience, all villages incorporated or unincorporated will be referred to by that title, although of those mentioned herein the villages of Southampton and Patchogue are the only ones incorporated.)

A lighting district known as the Eastport lighting district has been established in the western end of the town of Southampton. This district includes portions of the village of Eastport located in the town of Southampton, the village

of Speonk, and the hamlet of Remsenburg. This district is bounded on the east by the Speonk river.

The distance from the Speonk river (which is practically the eastern boundary of the village of Eastport) to the village of Southampton is about twenty miles. Within this distance, proceeding from the Speonk river toward the east, are located the village of West Hampton where a lighting district has been established, the village of Quogue where another lighting district has been established, and the villages of Good Ground and Shinnecock Hills, all unincorporated villages.

The Patchogue Electric Light Company, the petitioner in this proceeding, is located at the incorporated village of Patchogue in the town of Brookhaven, which is situated about sixteen miles westerly of the village of Eastport. The petitioner has extended its electric lines from the village of Patchogue to the postoffice in the village of Eastport, which is located in the town of Brookhaven about two hundred feet westerly of the east line of that town. It is now supplying light in that portion of the village of Eastport which is located in the town of Brookhaven. It has obtained from the Town of Southampton a franchise dated October 26, 1911, giving to it the privilege and right to erect and maintain poles, fixtures, and wires, and to construct and maintain necessary poles and wires, for supplying electricity for light, heat, and power to the inhabitants of the town of Southampton in a territory described as "west of Speonk river and south of a line one thousand feet north of and parallel with the Old Country Road". The territory covered by this description includes that portion of the village of Eastport located in the town of Southampton, the village of Speonk, and the hamlet of Remsenburg. It is approximately three miles in length from east to west.

In pursuance of this franchise, and subject to the permission of the Commission to exercise the same, the petitioner has made a contract with the supervisor, town clerk, and

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justices of the peace of the Town of Southampton, constituting the town board, dated November 28, 1911, in behalf of the Eastport lighting district located in the territory last hereinbefore described, to supply said lighting district with light under the conditions therein named for a period of ten years from the date thereof.

The petitioner asks in this proceeding permission under section 68 of the Public Service Commissions Law to exercise its franchise in that part of the town of Southampton described therein and begin construction of its plant. The Town of Southampton has granted three franchises to electric light companies. The first was granted in October, 1903, to the Southampton Electric Light Company, a corporation whose property and franchises were thereafter purchased by the Suffolk Light, Heat and Power Company, which is the company now doing business in the village of Southampton. The franchise named is the one under which the Suffolk company is now operating. A second franchise was granted by the Town of Southampton to the Riverhead Electric Light Company, giving that company permission to operate in the town of Southampton in a territory west of the Quantuck creek. This franchise was granted in June, 1910. The third franchise is the one hereinbefore set forth, granted in October, 1911, to the Patchogue Electric Light Company.

The Riverhead Electric Light Company operates in the lighting district of West Hampton located immediately easterly of the Eastport and Speonk lighting district and between that district and the district at present occupied by the Suffolk company. The Riverhead company has filed with the Commission a consent dated November 23, 1911, that an order be entered allowing the petitioner to operate in the town of Southampton west of Speonk river.

The petition is opposed by the Suffolk Light, Heat and Power Company. The plant of that company is located in the village of Southampton where it has also a distribution system. It has extended its line easterly from the village of

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Southampton to the village of Water Mill, a distance approximately of two miles. It has also recently extended its line westerly from the village of Southampton to a point beyond the Shinnecock Hills. It has erected poles through the Shinnecock Hills but no wire has as yet been placed upon the poles, and the poles reach westerly from Southampton to the Shinnecock canal, a distance of about seven miles from Southampton. Beyond the Shinnecock canal westerly the Suffolk company has placed some poles upon the ground as far as Quogue, and some holes have been dug in which said poles are to be set, but no line has been constructed. At the present time the actual construction of the Suffolk company can not be said to have extended westerly farther than Shinnecock canal, or possibly Good Ground, a distance of twelve or thirteen miles from the Speonk river.

The ground upon which the objector, the Suffolk Light, Heat and Power Company, asks that the petition be denied is that it intends to construct its line farther to the west and eventually to reach Eastport and Speonk in order to serve those places with whatever electric current is demanded there.

The evidence clearly shows that at the present time the objector has no investment whatsoever in the territory covered by petitioner's franchise and that it has no construction at the present time nearer than twelve miles from the petitioner's territory, with the exception of the poles laid on the ground and some holes dug immediately west of the Shinnecock canal.

The reason for refusing to one corporation permission to exercise a franchise and begin construction in a territory already occupied by another is to prevent duplication of plants and hurtful competition between the two companies, with the attendant ultimate cost to the public and the detriment to service which is likely to ensue where two companies are occupying a territory which is rich enough in revenue

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properly to support only one. These reasons are not present in this case. The Suffolk company has no investment whatever in the territory described in the franchise of the petitioner sought to be exercised. Its nearest constructed line at the present time is at the Shinnecock canal, which is approximately twelve miles east of the east line of the Speonk river, which is the east boundary of the territory named in petitioner's franchise.

The town of Southampton is over twenty miles long from east to west. It can not be said that the exercise of a franchise, although granted for the town at large, in the territory at the extreme western end of it can preëempt the territory in all other parts of the town to the extent of barring out all other lighting companies from exercising, in localities not actually occupied, franchises properly granted. This is not a question of the right of the Suffolk company to exercise its franchise in the Speonk district of the town of Southampton, and no opinion is expressed as to whether it should have that right or not. The question here to be determined is the right of the Patchogue company to exercise its franchise in that district, and the Suffolk company has shown no good reason why it should not be permitted so to do. The principle laid down by the Commission in the Islip case, decided May 5, 1910, applies here, for the circumstances are practically the same.

The petitioner is now actually supplying the western portion of the village of Eastport, *i. e.* that which lies in the town of Brookhaven. To reach the eastern portion of that village it has only to construct two hundred feet of line, and it will then be able to reach its distribution system to be constructed in the Eastport and Speonk lighting district and commence giving service there. The Suffolk company at this time has no appreciable investment nearer than twelve miles from this point. Aside from its legal right to supply the territory at Eastport and in the Speonk lighting district, the Patchogue company is the logical and natural company

to give the service, being now right on the ground with its wires.

The certificate of incorporation of the petitioner as filed on the hearing showed a somewhat questionable right to operate in the town of Southampton. This has been cured by an amended certificate which has been adopted by the petitioner and duly filed with the county clerk of Suffolk County and with the Secretary of State. A certified copy of this amended certificate has been filed with the Commission, and shows that the petitioner has now the right under it to operate in any part of Suffolk county.

The petition should be granted.

In the Matter of the Application of THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY for authorization to purchase from The New York, New Haven and Hartford Railroad Company 291,600 shares of the common stock and 22 shares of the preferred stock of the New York, Ontario and Western Railroad Company.

The application is denied for the following reasons:

1. No transfer of a bare majority interest in the stock of the New York, Ontario and Western Railroad Company from the New Haven to the Central should be permitted without reasonably guarding the minority stockholders from possible oppression by the majority interest. No means are apparent by which this can be done in this case except by imposing as a condition of the authorization that the Central shall take over such of the minority stock as may be offered it upon the same terms per share as it pays the New Haven. If the minority stockholders availed themselves of this privilege, it would make the purchase price to be paid by the Central substantially \$26,000,000 and involve an annual fixed charge for interest of substantially \$1,150,000. The Commission is unwilling to impose this burden upon the Central, and has had its attention called to no advantage which in its judgment would compensate for the disadvantages involved in such an investment.

2. The energies of the Central and its credit and resources of every nature should properly be devoted to the public duties and burdens with which it is now charged and to the urgently demanded solution of the numerous and complicated problems pressing upon it in connection with the proper growth and development of its existing properties.

Submitted March 20, 1912. Decided April 2, 1912.

Albert H. Harris for The New York Central and Hudson River Railroad Company.

Samuel Untermyer for certain stockholders of the Rutland Railroad Company.

STEVENS, *Chairman*:

The New York, Ontario and Western Railway Company is a railroad corporation of the State of New York owning a main line of railroad extending from Cornwall, New York,

to Oswego, New York, with branch lines owned, controlled by ownership of stock, or leased, reaching Scranton, Penna.; Kingston, Delhi, Utica, and Monticello in the State of New York. It has trackage rights over the West Shore railroad, leased to The New York Central and Hudson River Railroad Company, from Cornwall, N. Y., to Weehawken, N. J., a distance of 53.07 miles, and has rights to the use of the West Shore Railroad terminal facilities at Cornwall and Weehawken, which rights are particularly set forth in a contract dated January 18, 1888.

Its capital stock issued and outstanding consists of 581,139.8284 shares of common stock and 40 shares of preferred stock, each of the par value of \$100. The par value of the common stock is \$58,113,983 and of the preferred stock is \$4000.

The New York, New Haven and Hartford Railroad Company owns 291,600 shares of the common stock of the par value of \$29,160,000, and 22 shares of the preferred stock of the par value of \$2200. The New York Central and Hudson River Railroad Company owns none of the stock except ten shares of the preferred stock.

It will be observed that the New Haven company owns a bare majority of the total stock issued, namely \$29,162,200, as against a minority interest of \$28,955,783: the difference between the amounts of the majority and minority interests being only \$206,417.

The New York Central and Hudson River Railroad Company now makes application to this Commission for authorization to purchase all of the above mentioned capital stock owned by The New York, New Haven and Hartford Railroad Company. Such authorization is required by subdivision 2 of section 54 of the Public Service Commissions Law, reading as follows:

No railroad corporation, street railroad corporation or electrical corporation, domestic or foreign, shall hereafter purchase or acquire, take or hold, any part of the capital stock of any railroad corporation,

or street railroad corporation, or other common carrier, organized or existing under or by virtue of the laws of this state unless authorized so to do by the commission empowered by this act to give such consent.

The two corporations have entered into an agreement for the sale and purchase of this stock, subject to the approval of this Commission, the Central agreeing to pay therefor the sum of \$13,108,397.62, by issuing its fifty-year debenture bonds for that amount dated July 1, 1911, bearing \$583,332 interest payable annually. The price thus agreed to be paid is practically 44.94 per cent of the par value of the stock involved.

For several years the Ontario and Western has been paying 2 per cent dividend upon its common stock. At this rate the dividends on 291,600 shares, the amount proposed to be transferred, would amount to \$583,200, which added to \$132, the annual 6 per cent dividend on 22 shares of preferred stock, makes the sum of \$583,332 as the return to the Central on its investment. This, it is to be noted, is the precise sum which it proposes to pay upon its debenture bonds to be issued in payment for the stock. It follows, therefore, as a necessary result of the proposed transaction, that the Central assumes an annual fixed charge of \$583,332 which can be met by returns from its investment, provided the Ontario and Western continues to pay a 2 per cent dividend upon its common stock.

The reasons assigned by the Central in its petition for acquiring the stock are substantially as follows:

1. That the business done by it over that part of the West Shore road owned by it between Oneida and Cornwall is very heavy and has been steadily increasing during the last few years. That with the proposed majority ownership of stock it would be possible to send a portion of that business over the line of the Ontario and Western between Oneida and Cornwall, and by so doing would increase the efficiency of the service and at the same time relieve congestion upon the West Shore road between the points named.

2. The road of the Ontario and Western reaches the anthracite coal region of Pennsylvania; the Central has lines which extend into the bituminous coal region of Pennsylvania but has none which reaches the anthracite fields, is dependent upon other roads for such anthracite coal business as it carries over its lines, and it is desirable that it have an independent entrance into the anthracite coal fields.

Upon the hearing, the Central urged as an additional reason that the trackage and terminal rights possessed by the Ontario and Western over the West Shore at and from Cornwall to and at Weehawken, N. J., were of great importance, and that it is extremely desirable the control of such track and terminal facilities should not pass into unfriendly hands, and especially so in view of prospective needs of enlargement of the terminal facilities at Weehawken.

Several important matters are involved in this application: (1) the protection of the rights of the minority stockholders; (2) the control of a comparatively small railroad by a great system which is to some extent competitive and which has to some extent intimate traffic relations with it; (3) possible elimination of competition by the practical control and absorption of the competing line; (4) the effect upon the Central itself which may be anticipated from the assumption of new responsibilities and liabilities.

A very considerable amount of evidence has been adduced bearing more or less directly upon all of these propositions. The Commission has very carefully investigated the history of the Ontario and Western for a period of years and has given such attention as was practicable to its prospects and the part which it will necessarily play in future railroad development in this State.

A discussion of all the matters which the Commission has considered would serve no useful purpose, for the reason that a proper disposition of the case does not depend upon them.

It is, however, proper to call attention to one significant tendency shown by the financial results of the operations of

the Ontario and Western during recent years. Since 1905 it has been paying an annual dividend of 2 per cent upon its common stock. Upon its ability to continue this dividend depends the ability of the Central to pay from the dividends received upon the stock purchased the fixed charge entailed by the purchase.

The relation between the net income of the Ontario and Western for the last five fiscal years, and the dividends declared, is shown by the following table:

	<i>Net income</i>	<i>Dividend</i>	<i>Surplus</i>
1907	\$1,654,783	\$1,162,302	\$492,481
1908	1,520,589	1,162,302	358,387
1909	1,343,127	1,162,322	180,805
1910	1,312,797	1,162,328	150,469
1911	1,142,936	1,162,336	Deficit 19,400

The tendency exhibited by this table requires no comment.

The following propositions we believe to be unquestionable:

a. The stock proposed to be purchased is a bare majority; the price is somewhat above the present market value; the business prospects of the Ontario and Western are not such as to make the transaction attractive as an investment.

b. The motive of the purchase is obviously to obtain control; the benefits to be derived are such as would flow from the control.

c. Control can be exercised for the benefit of the Ontario and Western or for the benefit of the Central. It has not been shown that control exercised for the benefit of the Central would necessarily result in benefits to the Ontario and Western and the public served by it, nor can we believe that benefits to the Central must inevitably be of advantage to all other interests.

d. The relations of the two roads, and especially because of the trackage and terminal rights above detailed, would be such that the majority control could easily dictate courses which would as a whole be advantageous to it, although not directly profitable to the Ontario and Western. Such possi-

bility would make easy an oppression of the minority which could not practically be prevented by the courts.

We do not intimate that such a course would be pursued by the Central, nor do we speculate as to its probability. The possibility of such a thing long after all now living have quit the stage of action should be sufficient to arouse our attention.

The Commission believes that the broad discretion conferred upon it in a matter of stock acquisition by railroad corporations should be exercised to guard against such possible oppression of minority stockholders as has often in the past excited the indignation of the weak and justified the severe animadversion of the courts.

As to the elimination of competition in violation of the so called anti-trust laws of both the State and the United States, it is not essential to enter upon any discussion in view of the considerations which the Commission deems should control the disposition of the case.

The application should be denied for the following reasons:

1. No transfer of a bare majority interest from the New Haven to the Central should be permitted without reasonably guarding the minority from possible oppression by the majority interest. No means are apparent by which this can be done in this case except by imposing as a condition of the authorization that the Central shall take over such of the minority stock as may be offered it upon the same terms per share as it pays the New Haven. If the minority stockholders availed themselves of this privilege, it would make a purchase price to be paid by the Central of substantially \$26,000,000 and involve an annual fixed charge for interest of substantially \$1,150,000.

The Commission is unwilling to impose this burden upon the Central, and has had its attention called to no advantage which in its judgment would compensate for the disadvantages involved in such an investment.

2. The continued successful development of the capabilities of the Ontario and Western requires close attention to and careful study of traffic, operating, and financial conditions. The burden imposed would be far from slight if properly carried.

It is the clear judgment of the Commission that the energies of the Central and its credit and resources of every nature should properly be devoted to the public duties and burdens with which it is now charged and to the urgently demanded solution of the numerous and complicated problems pressing upon it in connection with the proper growth and development of its existing properties.

In the Matter of the Petition of OSWEGO RIVER POWER TRANSMISSION COMPANY of Syracuse, N. Y., under section 68 of the Public Service Commissions Law for permission to begin construction and exercise rights and privileges under franchise granted by the City of Fulton.

The Oswego River Power Transmission Company purchased from the City of Fulton a franchise giving it the right for a period of forty years to furnish to the inhabitants of Fulton electricity for light, heat, power, and other purposes, and to maintain suitable structures within the city of Fulton for the purpose of using, distributing, and furnishing such electricity, and petitioned the Commission for permission under section 68 of the Public Service Commissions Law to exercise this franchise.

The application was opposed by the Fulton Light, Heat and Power Company which is now supplying the city of Fulton with current for light, heat, and power.

The petitioning company offered to supply current to the City of Fulton for public lighting at a rate which would be less than that which the City is now paying. It offered further to supply current for commercial and residence lighting at a rate less than is now furnished, and it also offered current for power purposes to be supplied under the terms and conditions as to rate and service of its "standard form of contract," so called.

The Fulton Light, Heat and Power Company, the objecting company, offered and stipulated to reduce its public lighting rate from \$75 per arc lamp per year to \$65 per arc lamp per year, for a period of five years. It further stipulated to sell, and to offer for sale, electric current for power purposes at the same rate and under the same conditions as are expressed in petitioner's "standard" contract hereinbefore referred to, but it did not offer to meet petitioner's rate for commercial and private lighting.

Held, That under these circumstances the petition should be denied.

The offer made by an applicant seeking to enter a territory already served by another company to reduce rates is insufficient, standing alone, to justify authorization to make such entrance without further inquiry as to the adequacy of the rate to afford continuous high class service and as to the policy of the company already serving the territory to reduce its rates to meet those proposed. If the applicant can afford to give the lower rate and maintain the standard of service, and the com-

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pany serving the public can not do so, then the right of the public to the lower rate is paramount and other considerations must give way. But in this case no evidence was directed to these particular points, nor has the applicant attempted to show that its proposed rates for commercial lighting meet the indicated requirements. Its desire to enter Fulton is primarily based upon the hope of selling power. If the rates for commercial lighting are considered high by the inhabitants of Fulton, the Public Service Commissions Law provides a remedy therefor in an application to reduce the same.

Where an electric light corporation which has no franchise to supply current within a municipality is actually serving current in that municipality but claims that it is doing so without violating any provisions of the Public Service Commissions Law, *held*, that its right so to serve current can not be determined in a proceeding brought under section 68 but should be taken up in one to be brought pursuant to section 74.

Facts in regard to the power situation in the city of Fulton fully stated.

Submitted February 9, 1912. Decided April 9, 1912.

E. M. White, George P. Decker, and John C. Davies for petitioner.

G. M. Fanning for the City of Fulton.

Holt, Warner and Gaillard for the Fulton Light, Heat and Power Company, in opposition.

Addison D. Merry for the Fulton Fuel and Light Company, in opposition.

OLMSTED, *Commissioner*:

The Oswego River Power Transmission Company (hereinafter referred to as the Oswego company) is a corporation organized for the purpose of selling and distributing electric current in various towns and cities of the State, one of which is the city of Fulton. It does not produce electricity but purchases it from the Niagara, Lockport and Ontario Power Company under a contract with the latter company dated November 22, 1905. It has at the present time a sub-station located on the outskirts of the city of Fulton

which is reached by its transmission lines without crossing any streets, avenues, or public places of said city. This sub-station has at the present time a capacity of 1800 horsepower, and from it lines now run to the Victoria paper mills to which it is supplying under a contract at the present time electric current to the amount of approximately 250 horsepower, and to the North End Paper Company to which it is supplying current to the amount of approximately 150 horsepower, also under a contract. Both of these mills are situated in the city of Fulton, but it is claimed by the petitioner that in order to reach them no streets under the control of the City are crossed.

The petitioner has a franchise from the City of Fulton purchased by it at public sale on the 9th day of March, 1911, and for which it paid the City of Fulton the sum of \$2000. This franchise grants to the petitioner, under certain restrictions and conditions named therein, but which it is unnecessary here to state, the right "for a period of forty years to distribute within the city of Fulton, New York, and to furnish to the inhabitants thereof, electricity for light, heat, power, and other purposes, and to erect and maintain in, through, on, under, and over the streets, avenues, alleys, highways, and bridges of the City of Fulton, the necessary poles, towers, cables, wires, subways, conduits, appliances and structures for the purpose of using, distributing, and furnishing such electricity".

Under the terms of this franchise the City of Fulton is to have the free use of any poles erected and one duct in any subway constructed for the purpose of carrying the wires of its fire alarm system and its police alarm system. The grantee in said franchise also agrees to furnish free to the City of Fulton at the City Hall, Fire Department Buildings, Police Station, Hospital, Public Library, and Office of the Public Works, electricity for lighting purposes as may be reasonably necessary. It also agrees that its maximum rate to be charged for electricity for lighting purposes

shall be 8 cents per kilowatt hour where sold on a kilowatt hour basis, with a discount of 10 per cent if paid on or before the 10th of the month following that in which electricity is delivered, with a minimum charge of 50 cents a month. It further agrees, if requested so to do, to furnish to the City of Fulton all electricity which the City may require for lighting the city streets at the price of 1 cent per kilowatt hour, such electricity to be delivered and measured on the switchboard of the Oswego company in the city of Fulton.

The petitioner in this proceeding asks for an approval of this franchise, and permission, pursuant to section 68 of the Public Service Commissions Law, to begin construction thereunder.

The application is opposed by the Fulton Light, Heat and Power Company (hereinafter referred to as the Fulton company) which is a New York corporation now doing business in the city of Fulton and which has been doing business in that city since 1902. This corporation at the present time supplies all the electric power now sold in the city of Fulton, whether for light, heat, or power purposes, with the exception of what is supplied by the petitioner to the Victoria and North End paper mills. Some manufacturing establishments generate electric energy for their own use, but none is sold except as above stated. The residential and public lighting is done entirely by the Fulton company. The application is also opposed by the Fulton Fuel and Light Company, a corporation supplying the city of Fulton with manufactured gas.

The petitioner states that if it is allowed to exercise its franchise and distribute electricity in the city of Fulton it will reduce the price of current to lighting consumers. Its proposed rates have been already stated. The corresponding rates of the Fulton company at the present time are: Residence: 12 cents per kilowatt hour, less 2 cents if paid within fifteen days; minimum charge 75 cents net. Commercial:

first 50 kilowatt hours 12 cents; second 50 kilowatt hours 10 cents; third 50 kilowatt hours 9 cents; fourth 50 kilowatt hours 8 cents; above 200 kilowatt hours 7 cents; straight discount 20 per cent if paid within fifteen days. Small motors, 6 cents per kilowatt hour, less 1 cent if paid within fifteen days; large motors, 4 cents to 1 cent per kilowatt hour, less \$0.005 if paid within fifteen days.

The principal reason, however, advanced by the petitioner in support of its petition is this: It claims that there is at the present time a large demand for power in the city of Fulton which the Fulton company (the objector), as petitioner claims, has not in the past been able to fill and which it is not at the present time in a position to supply. The Fulton company denies this statement, and alleges that there is no demand for power in the city of Fulton at this time which it is not able and willing to supply upon reasonable terms. Upon this point the principal issue was joined, and a hearing took place in the city of Fulton on July 5 and 6, 1911, to ascertain the facts. The evidence given at this hearing shows that the Fulton company is at this time furnishing current to the people of Fulton for lighting purposes by a service which is good and adequate and at prices which are satisfactory.

The public lighting of the streets was not complained about as to its quality or character, but the price charged for that kind of lighting, \$75 per lamp per year, was claimed to be high.

Several witnesses produced by the petitioner were especially interrogated as to the house lighting, and answered that they had no complaint to make either as to service or as to price. So far as appears from the evidence in this case the Commission finds that the lighting current furnished to lighting consumers by the Fulton company is satisfactory. This finding does not preclude the people of Fulton or the mayor of the City from showing hereafter in a case properly brought before the Commission that the service should be

improved or that the rate charged should be reduced. Should the rate or the service be deemed objectionable by consumers, the Public Service Commissions Law furnishes an adequate means of remedying that condition.

The Commission is, however, confronted by the proposition of the applicant to furnish to the residents of Fulton commercial lighting at a lower price than that charged by the company now serving them. This is a matter which requires clear analysis and careful consideration.

Generally speaking, it is to the interest of a community to obtain electric current for lighting at the lowest rate which may be offered, and such is the usually accepted view. Like all general statements, this requires both amplification and modification. First, as to time. An abnormally low rate which can be maintained only for a brief period, and that at a loss to the seller, must eventually result in a state of affairs demoralizing to the service, unsatisfactory to every one, followed by a rise in rate which will be fixed, if possible, to recoup to some extent past losses as well as to compensate for present service. It is for the advantage of all that service should at all times be kept up to the best possible condition of efficiency, that the rate should be steady and uniform, with such reductions from time to time as improvements in the art, increased density of traffic, and time extension of load may justify and require. The temporary low rates occasioned by cut-throat competition have no justification. We are justified in saying that a rate so low that it can not be maintained is not desirable because of the results it entails. The general statement must be amplified so as to cover a reasonable time element and modified so as not to lose sight of the character of the service given during such time.

The mere offer by an applicant seeking to enter a territory already served by another company to reduce rates is insufficient standing wholly alone to justify authorization to make such entrance without further inquiry as to the ade-

quacy of the rate to afford continuous high class service, and as to the ability of the company already serving the territory to reduce its rates to meet those proposed. If the existing rate is unreasonable, the Commission has the power to reduce it. If the proposed rate is not adequate to maintain the service at the proper standard and yield some return upon the investment, it should not be considered. If the applicant can afford to give the lower rate and maintain the standard of service, and the company serving the public can not do so, then the right of the public to the lower rate is paramount and other considerations must give way. The progress of the world is dependent upon this principle.

In this case there has been no evidence directed to the points suggested. The applicant has in no manner attempted to show that its proposed rate meets the indicated requirements. Its desire to enter Fulton is avowedly based upon the hope of selling power. It may under all the circumstances very well hope that the company now having a distribution system would be compelled to endeavor to meet the rate in order to avoid annihilation, and that thus the applicant would be relieved of the lighting burden. It is useless to speculate on these matters. The applicant has failed to inform us upon a matter which should receive our full consideration before we can act affirmatively upon its application in that particular. It has directed its evidence in this proceeding entirely to the power situation.

As to the current furnished for power purposes, the testimony taken showed a wide range of opinion. A number of witnesses stated that there was a large demand for auxiliary power in Fulton. Others stated that there was no such demand, or at least no demand of such force that the power users would be willing to incur the expense of electric installations in order to make use of it even though circumstances were such that it could be supplied to them. The power situation was fully outlined in the testimony. Fulton is a city of about 9000 inhabitants, located on the Oswego river. It

has approximately twenty large industries using power, and they require approximately 16,000 horsepower per annum. A very large percentage of this power is developed by the manufacturers themselves by means of their own water-wheels. Some mills — the American Woolen mill as an example — develop their own electricity by generators run by their own water power. Others supplement their water power by steam installations. It was established by the testimony that at certain times of the year, when the water in the river was low or when its flow was impeded by anchor ice, there was a demand for auxiliary power, but the extent of the demand for it and the amount of such power which was likely to be taken were to a large extent problematical.

The Commission adjourned the proceedings and sent its engineer to make a study of the situation and report the facts. The report and a supplement thereto were duly made, copies furnished to all parties to the proceeding, and opportunity given at subsequent hearing to cross-examine the engineer. In these reports, of which both sides have expressed their general approval, a large number of facts regarding the power situation at Fulton are given, and the conditions fully discussed. It is unnecessary again to go over these facts here.

The findings most pertinent to the inquiry at this time are —

1. That there exists at Fulton at the present time a demand for power which is best stated in the words of the report: "It is clear, however, that since in 1908, 10,475 horsepower were in use, and since 15,361 horsepower were installed, *it seems as if the manufacturers of Fulton for four months in some years might need 2000 to 7000 horsepower in addition to what they can obtain from the river.*"

This was afterward changed, as will appear from a subsequent paragraph of the report, as follows: "Reading all the above matter carefully, it would seem as if the manufacturers of Fulton were in need of from 2000 to 5000

horsepower for varying periods of the year. Accustomed as they are to water power, which as a rule by some mental process is considered not to cost anything, some of them are unwilling to go to the expense of installing apparatus and paying a service charge for power whether they use it or not. Nevertheless, conversations with those persons whom I interviewed show conclusively that they would much prefer to have a full supply of power all the year 'round, and would be willing to pay for it, so that they could build the output of their business up to the capacity of their plants."

2. That the Oswego company is amply equipped to fill this demand either at the present time or for the immediate future.

3. That the Fulton company is amply equipped at the present time to supply any immediate demand that now exists, and that its present power plant can be made adequate by the installation of additional units to fill any demands for a reasonable time in the future.

4. Of the lighting service offered by the Fulton company, both as to public and private use, the report states: "No criticism of the service heretofore given or to be expected in the future from the Fulton Light, Heat and Power Company can be reasonably entertained. Without exception, when this matter has been mentioned comment has been favorable even by those friendly to the new company. Its rates are not higher than many other places in the State. Its new power plant has two 625-kw. generators in it, and an examination of its log sheets shows the maximum peak last year was 600 kw. This shows that there is ample capacity with one machine out of service to handle the load. In addition, the boiler capacity at the station is three 360-hp. units equipped with stokers. There is ample steam capacity, therefore, with one of its units idle . . . the city lighting is done on an all-night schedule, with 123 inclosed arc lamps, 450 watts each, and the price is \$75 per year."

From the information given by these reports and from the testimony given in the proceeding it appears that the Oswego company has power which it can deliver at Fulton ample both in amount and quality to take care of all the power needs of Fulton for the present and the immediate future.

It also appears that the Fulton company had at the time of the commencement of these proceedings a generating plant located on the Oswego river in the city of Fulton operated by water power and by steam. The State of New York, in the construction of the barge canal, appropriated the water rights of the Fulton company and paid it therefor the sum of approximately \$387,000. The State did not take the land of the Fulton company, and the company still owns its plant equipped with the steam installation. The Fulton company states that it intends to keep the steam plant as a reserve in active condition ready for operation at an hour's notice. It further states that it intends to apply to the State for a lease of water rights, which if obtained will enable it to make use of the water when not needed by the State, and to operate its water-wheels therewith. This will give it, as estimated by the Commission's engineer, power at its own plant as follows: steam power in reserve, 350 hp.; water power, if obtained, 900 hp., under present conditions.

Since the commencement of these proceedings the Fulton company has erected on a suitable site in the city of Fulton an additional new generating plant operated by steam, with an installed capacity at the present time of 1700 horsepower. This plant cost in the vicinity of \$100,000, and is so constructed that additional boilers and additional generators can be added as conditions may demand to supply power in any quantity that will be called for in Fulton so far as future needs can now be foreseen. It is further shown that the Fulton company has at the present time an investment in power plants and distributing system in the city of Fulton running up into the hundreds of thousands of dollars. It

is capable of generating at the present time 1200 horsepower, including reserve. Its peak-load for the year 1911 was not more than 800 hp.

The practice of the Commission in a situation such as is here presented has been fully stated in the case of the application of the Niagara Falls Lighting Company, decided July 1, 1909. The decisions of the Commission in analogous cases are there reviewed in detail, and it is unnecessary to repeat them here. It is there stated that the "policy of this Commission in cases where one lighting company seeks to enter a field already occupied by another requires that the applicant shall show that the company already serving the community is not doing so adequately and efficiently and that its failures are such that they can not well be corrected by the exercise of the regulative powers of the Commission. Good service may now be obtained at reasonable prices in less expensive ways than by unnecessary duplication of plants, and the public interest does not demand that capital invested in good faith in the public service should be destroyed or impaired without good reasons to be shown affirmatively."

Under the principle here set forth the Commission must hold that the company now occupying the field, whatever may have been its shortcomings in the past, should be given an opportunity with its present equipment to meet the demand for power which is clearly proved to exist.

The kind of power sought has been referred to in these proceedings as "intermittent". It is somewhat problematical whether the manufacturers of Fulton will be willing to contract for it in any great amount at prices which it is reasonably worth, notwithstanding the fact that they have expressed themselves as believing that it would be to their advantage to have the power present in the city and available. One or two companies have stated that they are ready at the present time to take it on. It must be presumed that if it is taken it must be paid for at prices which will rea-

sonably compensate the investment of capital necessary to deliver it when wanted on the premises where wanted. This, of course, presumes an equipment which must be kept ready for service the year 'round. So far as can be determined from the evidence and from the examination made by its engineer, the Commission is of the opinion that this kind of service can be furnished equally as well by the Fulton company as by the Oswego company; and for the purpose of ascertaining on just what terms the power would be supplied, the petitioner was asked upon the hearing of January 11, 1912, to state what form it would submit as its proposed contract for users of so called "intermittent" or auxiliary power in Fulton. It offered and placed in evidence its standard form, which as it states embodies its proposition both as to price and terms. What they are, as applied to a specific case, the following extract from the minutes will show:

Mr. S. B. Storer, the president of the Oswego company, being on the stand, testified as follows:

Examined by Mr. Merry:

Q. What would you furnish it for, continuous service 24 hours?

A. You mean on a ten-year contract or per month?

Q. No, on this kind of a contract (referring to the standard contract offered by the petitioner); you say this contract takes care of intermittent service, etc.?

A. It does, but the term of the contract is a matter of agreement between the power company and the purchaser in each case.

Q. Under your contract what would it figure out for a year: continuous service, 40-horsepower, 24 hours a day?

A. It doesn't cover that rate, sir.

Q. What would your company furnish it for if permitted to do business in Fulton?

A. Why, it would probably be approximately the same as that rate; not very different; \$60 a horsepower year, for continuous 24 hours power.

Q. Then your company, if permitted to transact business in the city of Fulton, would furnish 40 horsepower for one month to a power consumer for how much?

A. It would depend on whether it was one month's contract or a year contract.

Q. Well, under a month contract?

A. We wouldn't furnish it.

Q. Would you for three months?

A. No, not unless it was very easy to reach and without any particular expense.

Q. That answers it. You wouldn't contract with anybody for three months?

A. I don't think we would; no, sir.

Q. Would you for four months?

A. I doubt it.

Q. So that a power user in the city of Fulton, if you were permitted to transact business there under this franchise, would not be able to contract for four months' service in the year?

A. He could if he paid us a service charge all the year 'round on the contract amount of power.

Q. But you wouldn't make any contract with him for three months?

A. On the same basis; if he pays us a service charge we don't care whether he uses it thirty minutes or three thousand hours. It does not make any difference to us. He can use it whenever he pleases. It is ready for him. If he pays us a service charge on his contract amount of power it is ready for him at all times. If he doesn't use it, it is his lookout.

Q. So if any power user there wanted to make a power contract he must make a contract with you for at least a year even though he wants a service for three months or four months?

A. As a general proposition that would be the case; yes, sir.

Examined by Mr. Gaillard:

Q. In this case that Commissioner Stevens presented to you, I understand that if you make a contract with someone in Fulton for 150 horsepower, and he uses under that contract, he used 200 horsepower in one month in a year, he will have paid you about \$175 during the other eleven months in the year, and for the one month that he uses the 200 horsepower he will also pay you the \$175 plus about \$0.008, was it you said, per kilowatt hour?

A. I think you have the wrong impression of it. The 150 horsepower contract carries with it the payment per month of about 90 cents per horsepower per month on a contract amount of power which would be \$135 per month as a service charge, which would apply in all cases unless during some month he exceeded the 150 horsepower, in which case the service charge would be based on the maximum demand.

Q. What I am getting at is, he would have to pay the \$135 for every month in the year?

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A. Yes, sir.

Q. And if he did not want any power except for one month in the year, and during that one month he wanted 200 horsepower, that he would have paid you the \$135 for each of the twelve months in that year, and for the one month for which he used 200 horsepower he would have paid the additional amount based on the kilowatt-hour charge?

A. He would pay us our \$135 charge —

Chairman Stevens, to witness:

Q. It all comes right down to this, Mr. Storer: Now suppose a man wants to use 50 horsepower for just one month, of August; how much has he got to pay for it? And the rest of the year he furnishes his own power?

A. For the one month, if he wanted a contract for 50 horsepower and the right to draw on us at any time of day or night —

Q. I am assuming a case that he doesn't want to draw; but supposing he does not exercise the right, and he just wants to use your power during the month of August, and the rest of the time he furnishes his own; how much does he pay for the 50 horsepower?

A. He has paid practically \$500 a year as service charge —

Q. I don't care what you name it: any name you choose; let us get away from names.

A. I can not put it in any other way.

Q. You can call it anything you care to.

A. In addition to that he would have to pay one cent and four mills for every kilowatt hour he would use during August.

Q. In addition to the \$500?

A. Yes, sir.

Examined by Mr. White:

Q. In your experience in making up the contracts, did you ever know of a case where a man made a contract when he only wanted power for one month; do you know of any condition in Fulton that would only require power for one month?

A. There is no condition in the city of Fulton that I know of that would require power for one month. If they had it so they could use it the chances are they would use it, at least eight or nine months in the year.

Q. But for some months a great deal more than others on account of the low water or back water?

A. On account of low water; yes, sir.

Q. And the service charge would be no more whether he used it five or six months unless he took beyond the permissible demand or firm power?

A. It wouldn't be any different.

At the same hearing the Fulton company by its president, M. J. Warner, who was sworn as a witness, offered to duplicate this standard form of contract and to furnish power in any amount that might be called for by any power user in the city of Fulton upon the terms and conditions named in the standard form proposed by the Oswego company. Since the hearing, the Commission has received copies of letters written by the Fulton Light, Heat and Power Company to the Eureka Paper Company of Fulton and the Volney Paper Company of Fulton. These letters are identical and are in the following form:

February 17, 1912.

VOLNEY PAPER CO., *Fulton, N. Y.*

GENTLEMEN: We are prepared to furnish you electric power for motors you now have installed or others that may be desired, and would be pleased to make a contract with you for power for any period not less than one year upon terms and conditions identical with the so called Niagara power contract. We refer to that filed with the Public Service Commission, Second District, by the Oswego River Power Transmission Company, and which we understand has been offered you. We will be glad to take this up with you at any time.

Very truly yours,

FULTON LIGHT, HEAT AND POWER COMPANY.

The companies last above named are the two whose officers were produced as witnesses at the hearing in Fulton and who stated at that time that they needed power and were ready to contract for it on reasonable terms, but were unable to obtain it from the Fulton company.

There was considerable discussion at the last hearing herein as to whether the Fulton company would be able to furnish this power at the price at which it was offered by the Oswego company. This seems to us immaterial. The Fulton company is responsible, and if it enters into a contract to furnish the power it can be made to respond in damages for any failure to perform its agreement. It is willing to take the responsibility and should know whether or not it is selling power at a profit or at a loss. So far as the public is concerned, power users in Fulton are now

offered by the Fulton company power at rates not exceeding those at which the Oswego company agrees to furnish it. Should these rates be deemed unreasonable in the future, the Commission has power to reduce them on proper showing. It has also power to compel the Fulton company to furnish current of a kind suitable for the needs of the power users of Fulton and to any amount that may reasonably be demanded. In this connection, the following colloquy taken from the minutes of the hearing of January 11, 1912, is of interest:

Mr. M. J. Warner, president of the Fulton company, being on the stand, testified as follows:

Commissioner Olmsted, to witness:

Q. Mr. Warner, you have seen the contract made between the Oswego River Power Transmission Company and the Victoria Mills Paper Company?

A. Yes, sir.

Q. Would your company be willing to duplicate that contract?

A. Yes, sir.

Q. At the prices named there?

A. Exactly the same terms.

Q. Would you be willing to say the same thing of the contract with the North End Paper Company?

A. I am not so familiar with the North End Paper Company and do not know the load conditions which prevail. That seems to me to be a rather low price. I wouldn't want to commit myself definitely on that proposition.

Q. You heard the testimony of Mr. Storer which he gave this afternoon?

A. Yes, sir.

Q. The prices that he named there as the intending prices or the prices that their company intended to ask in Fulton, would you be willing to duplicate those?

A. The power prices?

Q. Yes.

A. He mentioned only power prices, I believe?

Q. Yes.

A. Yes, we would do so. I think an investigation of the prices we are now charging for the kilowatt hours sold would conclusively prove that the prices we are now getting are lower than that.

Q. Would you deem it reasonable, in case a demand for power on the terms expressed in these contracts and expressed in the contract that Mr. Storer has testified about (the standard contracts): would you deem it reasonable, in case there was a demand for that sort of power in Fulton, for the Commission to require you to increase your plant so as to take care of it?

A. Not without a service charge.

Q. Well, of course I mean a service charge such as is stated here; the service charge such as he mentioned.

A. With a proper service charge it makes no difference to any man who has power to sell, or it is not liable to at least, as to whether the customer uses the power at all.

Q. Assuming that you make a contract with a corporation desiring power similar to those that are presented here . . . would you deem it reasonable that the Commission should compel you to increase your plant to take care of that business, providing that you did not feel that you ought to do it?

A. I should; yes, sir. I understand, on the prices as outlined.

Q. Assuming that some mills — the Woolen mill for instance — should come to you and say that they wanted you to furnish them with a certain amount of power and be willing to make contract with you similar to the contract that the Victoria Paper Mill Company has made with the Oswego River Power Transmission Company; would you deem it reasonable that the Commission, on application of the Woolen Mill company to compel you to do that, should make an order compelling you to put your plant in such shape that you could take care of it there?

A. Yes, sir; and I should consider ourselves unreasonable if we didn't do it voluntarily.

The respondent has claimed in this proceeding that the Oswego company should be restrained from serving power to the Victoria and North End paper mills under its present contracts with those concerns. The Oswego company states that it is not serving this power under or by virtue of its franchise from the City of Fulton, but by rights granted to it by the State of New York to set poles and run wires along the banks of the canal. The Oswego company claims that its wires to these mills do not cross any public highway in the city of Fulton at places where the City of Fulton has control over the same, nor are there any of its poles set on

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public highways which are under the jurisdiction of the City.

The Commission is of the opinion that the matter of the right on the part of the Oswego company to continue this service can not be determined in this proceeding. It should be taken up in another one, to be begun pursuant to section 74 of the Public Service Commissions Law.

The Commission is of the opinion that the rate charged by the Fulton company to the City of Fulton for lighting is unreasonable and excessive. For this reason it has required the Fulton company to reduce such rate from the sum of \$75 to the sum of \$65 per year from and after the 1st day of May, 1912, to the date of the expiration of its present contract with the City of Fulton in 1914, unless such prices be increased with the consent of the mayor and the common council of the City of Fulton or other legally constituted authority, or with the consent of this Commission. It has required the Fulton Light, Heat and Power Company to file a stipulation to that effect with this Commission which becomes effective immediately, so that for all service after the 1st day of May, 1912, the City will be required to pay at the rate of \$65 per year for each arc lamp in use.

The petition should be denied.

In the Matter of the Application of THE WESTCHESTER STREET RAILROAD COMPANY for authorization to issue capital stock.

The entire property of the Tarrytown, White Plains and Mamaroneck Railway Company was sold at public judicial sale; and all of said property except a small portion of the track a little upward of one mile in length was sold to one Richard Sutro, who assigned the bid to The Westchester Street Railroad Company, a corporation organized for the purpose of taking and holding the said property. The Westchester Street Railroad Company makes application to the Commission for authorization to issue its capital stock in payment of the moneys required to make the purchase, and also to cover certain expenses incurred by the corporation with reference thereto. The total amount asked for is the sum of \$912,023.46.

The Commission finds the following facts from the evidence taken and the investigations made by it:

a. The duplication cost of the physical property acquired by the company, less depreciation, was \$445,693.98.

b. The purchase price of the property, including certain back taxes and other liabilities assumed by the purchaser, amounted to \$882,400.78. The remaining sum of \$29,622.68, for which the applicant desires to issue capital stock, is the aggregate of certain legal and other expenses incurred by the applicant in connection with acquiring the property.

c. The earning power of the property from the beginning of operation to the close of the fiscal year ended June 30, 1911, proved to be nothing, the operations of the road having resulted in a very considerable deficit exclusive of fixed charges and depreciation. The operating deficit for the eight years 1904-1911, both inclusive, was \$37,872, exclusive of a large amount of unpaid taxes, fixed charges, and depreciation.

d. The road is saddled with a franchise which requires it to transport passengers from Mamaroneck to White Plains for five cents. This operation, according to the figures submitted, results in loss to the company; and the claim is made by it that the enforcement of the franchise for a period of practically one year and ten months from December 8, 1909, to September 30, 1911, would have resulted in an operating deficit of \$6076.71.

e. The operating revenues of the road have increased very largely during the period 1904-1911: the total for 1904 being \$95,057, and for

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1911, \$228,585. The prospects for future increase of business are good, and under good management it is believed the road can be made productive of net revenue.

f. The value of the property at the time of sale, taking into consideration all of the foregoing matters, was \$400,000. The corporation was entitled to issue capital stock to that amount, and also for certain other expenses connected with the organization of the corporation and the acquisition of the property.

The principles upon which determinations of value of an existing property for the purposes of capitalization should be based, discussed at length. The rule recently laid down by the Legislature in section 55a of the Public Service Commissions Law, that such value is to be ascertained by "taking into consideration original cost of construction, duplication cost, present condition, earning power at reasonable rates, and all other relevant matters," is approved by the Commission.

Decided April 24, 1912.

William Greenough for applicant.

STEVENS, *Chairman*:

The Westchester Street Railroad Company makes application to this Commission for authorization to issue its capital stock to the amount of nearly \$1,000,000, for the purpose of acquiring nearly all the electric street railroad formerly owned by the Tarrytown, White Plains and Mamaroneck Railway Company. The questions involved in this application are so peculiar and difficult that a careful and somewhat extended statement of the facts upon which the application is to be disposed of is necessary.

History of the Tarrytown, White Plains and Mamaroneck Railway Company:

The Tarrytown, White Plains and Mamaroneck railroad extended from Tarrytown to White Plains, and from White Plains to Mamaroneck. It had several short branches extending northerly at or in the vicinity of White Plains; it also had a branch extending southerly from White Plains to Scarsdale, and a branch extending southwesterly from Mamaroneck to the easterly line of the village of Larchmont.

The road has been in operation for about fourteen years, in part. The lines from White Plains to Mamaroneck and from Mamaroneck to Larchmont were constructed later, in about 1904 or 1905. The road fell into a very bad way, both physically and financially, with the result that a foreclosure of the mortgage upon the property was instituted in the year 1909, a temporary receiver appointed, and a judgment of foreclosure and sale was finally entered in the office of the clerk of the County of Westchester on the 23rd day of July, 1909.

A sale of the property pursuant to the judgment of foreclosure was had on the 5th day of November, 1909, at which sale one Richard Sutro, acting for and on behalf of The New York, New Haven and Hartford Railroad Company, purchased the greater part of the railroad. The order confirming the sale was entered in the Supreme Court on the 20th day of November, 1909, and on December 1, 1909, Sutro paid to the referee, pursuant to the terms of the judgment, the sum of \$825,000, as follows:

Cash deposit at time of sale.....	\$25,000.00
Cash paid referee December 1.....	529,747.26
<hr/>	
Total cash paid	\$554,747.26
247 bonds secured by mortgage	247,000.00
Coupons	6,175.00
Interest	10,943.48
Interest	273.58
Interest	5,860.58
<hr/>	
Total paid	\$824,999.90

The bonds deposited with the referee, 247 in number, were a part of the 300 bonds of \$1000 each upon which the foreclosure was made. These bonds were owned by the New Haven company, and were purchased by it in the year 1909, by the exchange of New York and Stamford Railway Company bonds owned by it, which bonds had been shortly theretofore issued by the New York and Stamford company under an authorization of this Commission to pay an

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indebtedness to the New Haven company for cash advances. So far as appears in the case, the New Haven company had no connection with the Tarrytown, White Plains and Mamaroneck Railway Company until, subsequent to March, 1909, it acquired the bonds in question and caused the foreclosure to be instituted with a view of acquiring the railroad, either in whole or in part.

The applicant, The Westchester Street Railroad Company, was incorporated under the laws of the State of New York on December 1, 1909; the certificate of incorporation refers to and recites the foreclosure sale of the Tarrytown road, the purchase of parcels Nos. 1 and 2 by Sutro, that Sutro had associated with himself certain other persons named in the articles of incorporation, describes the property purchased at the sale, provides that the maximum amount of capital stock of the new corporation shall be \$1,000,000, consisting of 10,000 shares of the par value of \$100 each, and further recites that Sutro and his associates, pursuant to the provisions of section 9 of the Stock Corporation Law, desire to become a corporation for the purpose of taking and holding the property purchased by Sutro at the sale aforesaid.

On the 3rd day of December, 1909, the Supreme Court made an order which was entered on the 4th day of December, 1909, authorizing Sutro to assign to the applicant his right to the deed to the property purchased by him, and authorized The Westchester Street Railroad Company to accept the assignment.

On the 4th day of December, 1909, in a form approved by the court, Sutro assigned to The Westchester Street Railroad Company his right to the deed; and thereafter, on December 7, 1909, pursuant to the said orders of the court, the referee making the sale conveyed to the applicant, The Westchester Street Railroad Company, the property, premises, rights, privileges, and franchises described in the judgment of foreclosure as parcels Nos. 1 and 2.

Stock authorization asked for:

The applicant, The Westchester Street Railroad Company, now asks this Commission to authorize it to issue its common capital stock to the amount paid by Sutro pursuant to the terms of his bid, namely \$825,000, and the other sums which have been paid by him in connection with the transaction and pursuant to the terms of his bid; the entire amount for which capitalization is asked is stated as follows:

Paid to referee, as hereinbefore stated.....	\$825,000.00
Arrears of taxes paid to State of New York and sundry local authorities	46,761.49
Arnold claim	8,000.00
Riggins tort claim.....	1,750.00
Hitchins tort claim.....	200.00
Paving taxes, White Plains	689.29
Services of attorneys with reference to special franchise.....	554.80
Incorporation tax	500.00
Certificate of incorporation	25.00
Legal expenses of attorney in connection with procuring bonds at foreclosure sale and reorganization sale generally	15,149.92
Services of Sutro in the matter.....	11,190.15
One desk and chair	29.40
One stove, etc.	25.47
Westinghouse, Church, Kerr & Co., for appraising property subsequent to purchase	2,147.94
Total	\$912,023.46

The New York, New Haven and Hartford Railroad Company makes a joint application, in which it asks that this Commission consent that the entire capital stock thus to be issued may be taken and held by it.

Primary question presented by the case:

The applicant is entitled by law to take and hold the railroad property involved. It is entitled to issue stock for the same. The only question presented is, how much stock shall be issued for it. The sole purpose of an issue of stock is the acquisition of property. The amount which may be issued is governed by the provisions of section 55 of the Stock Corporation Law, which reads as follows:

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No corporation shall issue either stock or bonds except for money, labor done or property actually received for the use and lawful purpose of such corporation. Any corporation may purchase any property authorized by its certificate of incorporation or necessary for the use and lawful purposes of such corporation and may issue stock to the amount of the value thereof in payment therefor, and the stock so issued shall be full paid stock and not liable to any further call, neither shall the holder thereof be liable for any further payment under any of the provisions of this chapter; and in the absence of fraud in the transaction the judgment of the directors as to the value of the property purchased shall be conclusive; and in all statements and reports of the corporation by law required to be published or filed, this stock shall not be stated or reported as being issued for cash paid to the corporation but shall be reported as issued for property purchased.

Section 55 of the Public Service Commissions Law provides that a railroad corporation may issue stock when necessary for the acquisition of property "provided and not otherwise that there shall have been secured from the proper commission an order authorizing such issue, and the amount thereof, and stating the purposes to which the issue or proceeds thereof are to be applied, and that in the opinion of the commission the property to be procured or paid for by the issue of such stock is reasonably required for the purposes specified in the order".

It is clear from these two provisions of law that the stock to be issued in this case for the acquisition of the property in question must be only equal in amount to the amount of the value of the property, and that the question for the Commission to solve is the value of the property.

It is not understood that the applicant claims that the provision in section 55, "in the absence of fraud in the transaction the judgment of the directors as to the value of the property purchased shall be conclusive," is applicable to this case and binding upon this Commission. This provision was enacted many years previous to the passage of the Public Service Commissions Law and for purposes which have no connection with the administration of that law. It has been the uniform practice of this Commission to inquire

into and pass upon the value of property acquired by a corporation for which it seeks to issue stock or bonds, and it has been uniformly assumed by the Commission and by those seeking its authorization that this provision did not apply to determinations made by the Commission in fixing the amount of stock or bonds which could be issued for such acquisition. It will be unnecessary, therefore, to discuss this point further. The question in this case for the Commission to solve is the value of the property sought to be capitalized.

In what manner and upon what principles the value of the property is to be determined:

It is indispensable that at the outset there should be a complete consideration of the manner in and the principles upon which the value of the property is to be determined. This may seem to be a simple matter, but instead it is most difficult and complex. The difficulties arise from a variety of matters which it is now proper to treat in detail.

The determination of the value of property by governmental authority may become necessary in a variety of cases, but for our purposes we may consider only the three principal classes: (1) Assessments for purpose of taxation; (2) valuations in the fixing of rates to be charged by public service corporations; (3) valuations necessary in the authorization of capitalization of such corporations. In the first two classes, rules for fixing value have been very largely considered by the courts. In the third class, such rules have not, so far as I am aware, been laid down by any judicial authority which is binding upon this Commission. In solving the immensely important and highly intricate question, what rule should we follow, we are bound by nothing in the way of arbitrary authority and the whole subject is open to the freest examination and discussion. It is undoubtedly prudent, if not indispensable, to review the decisions of the courts in taxation and rate cases. Whether such examination will result in light will be better known at its conclusion.

It must be premised that no case which has come under my notice decides the precise questions which must be settled in a capitalization case although the language of the court may appear to be applicable. Attention will therefore be largely directed to the reasoning of the various cases cited for the purpose of showing the differing theories which have received judicial sanction.

One well known and well understood method of fixing the valuation of a railroad property is that commonly called a commercial valuation, which is arrived at by ascertaining the cash or market value of the shares of stock and of the funded debt. This seems to have great judicial support. *Taylor vs. Secor*, 92 U. S. 575, decided by the United States Supreme Court in 1876, is one of several cases commonly known as the state railroad tax cases. The opinion of the court was delivered by Mr. Justice Miller, and the following extracts from it are of large importance:

It may be assumed for all practical purposes, and it is perhaps absolutely true, that every railroad company in Illinois has a bonded indebtedness secured by one or more mortgages. The parties who deal in such bonds are generally keen and farsighted men, and most careful in their investments. Hence the value which these securities hold in market is one of the truest criteria, so far as it goes, of the value of the road as a security for the payment of those bonds.

These mortgages are, however, liens on the road, and taking precedence of the shares of the stockholders, may or may not extinguish the value of his shares. They must in any event affect that value to the exact amount of the aggregate debts; for all that goes to pay that debt and its interest diminished *pro tanto* the dividend of the shareholder and the value of his share.

It is, therefore, obvious that when you have ascertained the current cash value of the whole funded debt, and the current cash value of the entire number of shares, you have, by the action of those who above all others can best estimate it, ascertained the true value of the road, all its property, its capital stock and its franchises; for these are all represented by the value of its bonded debt and of the shares of its capital stock.

This would, of itself, be, perhaps, the fairest basis of taxation for the State at large, if all railroads were solvent and paid the interest promptly on their funded debt.

Regarding the method of ascertaining the value of the roadbed, tracks, and other structures connected therewith of a railroad, the court makes the following remarks:

But, as we have already said, a railroad must be regarded for many, indeed for most purposes, as a unit. The track of the road is but one track, from one end of it to the other, and except in its use as one track, is of little value. In this track as a whole, each county through which it passes has an interest much more important than it has in the limited part of it lying within its boundary. Destroy by any means a few miles of this track, within an interior county, so as to cut off the connection between the two parts thus separated, and, if it could not be repaired or replaced, its effect upon the value of the remainder of the road is out of all proportion to the mere local value of the part of it destroyed. A similar effect on the value of the interior of the road would follow the destruction of that end of the road lying in Chicago, or some other place where its largest traffic centers. It may well be doubted whether any better mode of determining the value of that portion of the track within any one county has been devised than to ascertain the value of the whole road, and apportion the value within the county by its relative length to the whole.

The headnotes of the case were prepared by Justice Miller, and one of them states succinctly and accurately the court's approval of the commercial valuation method in the following language:

The capital stock, franchises, and all the real and personal property of corporations, are justly liable to taxation; and a rule which ascertains the value of all this, by ascertaining the cash value of the funded debt and of the shares of the capital stock as the basis of assessment, is probably as fair as any other.

One may, perhaps, be permitted to inquire what is meant when the learned justice remarks in the first quotation: "This would, of itself, be, perhaps, the fairest basis of taxation for the State at large, if all railroads were solvent and paid the interest promptly on their funded debt." It would seem to indicate an opinion that the rule would not hold good in the case of an insolvent company although just in the case of one which is solvent. Without criticising the distinction, if there be one, the observation is warranted that,

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assuming its validity, the commercial valuation rule would be valueless in the case of a property which has been sold at judicial sale, the corporation whose title or interest was sold being obviously in the class of insolvents.

In *Pittsburg, Cincinnati, Chicago and St. Louis Railway Company vs. Backus*, 154 U. S. 421, decided in 1894, the opinion of the same court was delivered by Justice Brewer. The language used by the court in the state railroad tax cases supporting the commercial valuation theory of assessment is cited with approval and followed.

The language of the Supreme Court of Tennessee in the case *Franklin County vs. Railroad Company*, 12 Lea 521, is also cited with approval, such language being as follows:

The value of the roadway at any given time is not the original cost nor *a fortiori* its ultimate cost after years of expenditure in repairs and improvements. On the other hand, its value can not be determined by ascertaining the value of the land included in the roadway assessed at the market price of adjacent lands, and adding the value of the cross-ties, rails, and spikes. The value of land depends largely upon the use to which it can be put, and the character of the improvements upon it. The assessable value, for taxation, of a railroad track can only be determined by looking at the elements on which the financial condition of the company depends, its traffic, as evidenced by the rolling stock, and gross earnings in connection with its capital stock. No local estimate of the fraction in one county of a railroad track running through several counties can be based upon sufficient data to make it at all reliable, unless, indeed, the local assessors are furnished with the means of estimating the whole road.

This of course constitutes a distinct and unqualified disapprobation of the theory that cost of reproduction is a fair measure of the value of a railroad roadway and the structures thereon.

In *Adams Express Company vs. Ohio State Auditor*, 165 U. S. 194, decided in 1896, by the same court, the State of Ohio had by statute directed a particular method of assessing the property of express companies doing business within that State. This statutory method was as follows:

In determining the value of the property of said companies in this State to be taxed within the State and assessed as herein provided,

said board shall be guided by the value of said property as determined by the value of the entire capital stock of said companies, and such other evidence and rules as will enable said board to arrive at the true value in money of the entire property of said companies within the State of Ohio, in the proportion which the same bears to the entire property of said companies, as determined by the value of the capital stock thereof, and the other evidence and rules as aforesaid.

The company had no property in the State of Ohio other than personal. The value of this personal property was averred in the bill and was conceded by the demurrer upon which the case came before the court to have been correct. The valuation thus returned and the amount of the assessment levied on such personal property by the state board were as follows:

<i>Assessment for 1893:</i>	
Value as alleged in the bill.....	\$53,080.74
As assessed by the state board	460,033.08
<i>Assessment for 1894:</i>	
Value as alleged in the bill.....	41,102.60
As assessed by the state board.....	543,569.00
<i>Assessment for 1895:</i>	
Value as alleged in the bill.....	42,065.00
As assessed by the state board.....	533,095.80

The precise questions decided by the court are not material at this time. The interesting part of the discussion is how the differing theories as to the proper mode of assessing values were treated. Without naming them the court had in mind commercial value, net earning power capitalized, and cost of reproduction. Chief Justice Fuller in the prevailing opinion uses the following language:

As to railroad, telegraph, and sleeping car companies engaged in interstate commerce, it has often been held by this court that their property in the several States through which their lines or business extended might be valued as a unit for the purposes of taxation, taking into consideration the uses to which it was put and all the elements making up aggregate value, and that a proportion of the whole fairly and properly ascertained might be taxed by the particular State without violating any Federal restriction. The valuation was, thus, not confined to the wires, poles, and instruments of the telegraph

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company; or roadbed, ties, rails, and spikes of the railroad company; or the cars of the sleeping car company; but included the proportionate part of the value resulting from the combination of the means by which the business was carried on, a value existing to an appreciable extent throughout the entire domain of operation. And it has been decided that a proper mode of ascertaining the assessable value of so much of the whole property as is situated in a particular State is, in the case of railroads, to take that part of the value of the entire road which is measured by the proportion of its length therein to the length of the whole; or, taking as the basis of assessment such proportion of the capital stock of a sleeping car company as the number of miles of railroad over which its cars are run in a particular State bears to the whole number of miles traversed by them in that and other States; or such a proportion of the whole value of the capital stock of a telegraph company as the length of its lines within a State bears to the length of all its lines everywhere, deducting a sum equal to the value of its real estate and machinery subject to local taxation within the State.

In the following language he distinctly negatives the idea that cost of reproduction is, at least in the case before him, the true measure of the value of property which is used as a unit in the public service:

But the property of an express company distributed through different States is as an essential condition of the business united in a single specific use. It constitutes but a single plant, made so by the very character and necessities of the business.

It is this which enabled the companies represented here to charge and receive within the State of Ohio for the year ending May 1, 1895, \$282,181, \$358,519, and \$275,446, respectively, on the basis, according to their respective returns, of \$42,065, \$28,438, and \$23,430 of personal property owned in that State, returns which confessedly do not, however, take into account contracts for transportation and accompanying facilities.

Considered as distinct subjects of taxation, a horse is, indeed, a horse; a wagon, a wagon; a safe, a safe; a pouch, a pouch; but how is it that \$23,430 worth of horses, wagons, safes, and pouches producea \$275,446 in a single year? Or \$28,438 worth, \$358,519? The answer is obvious.

Upon an application for a rehearing reported in 166 U. S. 185, Mr. Justice Brewer, speaking for a majority of the

court, used the following language, which is a vigorous argument in favor of determining value by net earning power:

Now, it is a cardinal rule which should never be forgotten, that whatever property is worth for the purposes of income and sale it is also worth for the purposes of taxation. Suppose such a bridge were entirely within the territorial limits of a State, and it appeared that the bridge itself cost only \$1,277,000, could be reproduced for that sum, and yet it was so situated with reference to railroad or other connections, so used by the traveling public, that it was worth to the holders of it in the matter of income \$2,900,000, could be sold in the markets for that sum, was therefore in the eyes of practical business men of the value of \$2,900,000, can there be any doubt of the State's power to assess it at that sum, and to collect taxes from it upon that basis of value? Substance of right demands that whatever be the real value of any property, that value may be accepted by the State for purposes of taxation, and this ought not to be evaded by any mere confusion of words. Suppose an express company is incorporated to transact business within the limits of a State and does business only within such limits, and for the purpose of transacting that business purchases and holds a few thousands of dollars worth of horses and wagons, and yet it so meets the wants of the people dwelling in that State, so uses the tangible property which it possesses, so transacts business therein, that its stock becomes in the markets of the State of the actual cash value of hundreds of thousands of dollars. To the owners thereof, for the purposes of income and sale, the corporate property is worth hundreds of thousands of dollars. Does substance of right require that it shall pay taxes only upon the thousands of dollars of tangible property which it possesses? Accumulated wealth will laugh at the crudity of taxing laws which reach only the one and ignore the other, while they who own tangible property, not organized into a single producing plant, will feel the injustice of a system which so misplaces the burden of taxation.

The question has arisen in the English Privy Council. According to an article in the *Electrical World* for June 30, 1910, the Judicial Committee of the Privy Council of England, upon an appeal from the Supreme Court of New Zealand, has had occasion to pass upon the question of value of a "gas works and plant". In 1895 an act of the New Zealand legislature authorized the Hamilton Gas Company to construct works in the city of that name, on condition that the City might purchase the "gas works and plant"

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after twelve years, at a price to be determined by arbitration. The City decided to purchase the works, and as the arbitrators could not agree on the valuation, an umpire was appointed. The umpire found that the value of the gas works and plant, considered merely as a structure, was about \$65,000, but that the commercial value of the works, that is, the value of the plant and business combined, was about \$150,000; and a case was stated for the Supreme Court of New Zealand as to which basis of valuation should be adopted. The contention of the gas company was as follows:

At the hearing the gas company contended that the price to be paid for the purchase of the gas works and plant should be the commercial value thereof as a going concern, taking into consideration their present condition, rental value, earning power, and all surrounding circumstances, and not merely as on a sale of apparatus *in situ* and land and buildings; and that the arbitrators and umpire, in arriving at and determining such price, were entitled to capitalize the net annual profit or rental, which, in their opinion, the gas company was, and might reasonably be expected to be, able to continue to earn and receive thereby and therefrom.

The contention of the City was as follows:

The Borough Council claimed that the price should be merely the value of the gas works and plant regarded as gas works and plant *in situ* capable of earning a profit, and that this value should be arrived at by taking the present value of the land and buildings and adding thereto what would be the present cost of the machinery and materials of a similar gas works and plant, and of placing such gas works and plant *in situ* and making good the ground and deducting a sum for depreciation; or, by taking the cost of the land, buildings, gas works and plant, and laying down the gas works and plant, making good the ground, and deducting a sum for depreciation.

Here was presented a direct conflict between the two theories of earning power and reproductive cost. The judgment delivered by the Privy Council sustained the contention of the gas company and fixed the value of the property at the earning power capitalized. The value awarded was two and three-tenths times as great as the mere reproductive cost, less depreciation, and this higher value was obtained by

capitalizing the annual net profits that the company was earning and might be expected to continue to earn.

The net result of the cases in the United States Supreme Court in which the method of valuing the property of solvent railroad corporations for the purposes of taxation has come up for consideration, is that the commercial method of valuation is the one which is to be followed, as giving the most satisfactory results.

In the State of New York the proper method of assessing railroad property for the purposes of taxation has received considerable attention, with results which will best be understood by a brief consideration of some of the principal cases. The question came before the Court of Appeals in 1871, in the case of *People ex rel. Buffalo and State Line Railroad Company vs. Peter Barker et al., Assessors of the Town of Evans*, reported in connection with a like case against the assessors of the Town of Hamburg, reported together in 48 N. Y. 70. It appears from the report that the assessors of the Town of Hamburg assessed the property of the relator within the town at \$225,000. The relator submitted to the assessors proof that the entire value of its land and superstructures and fixtures within the town did not exceed \$68,667.70, and apparently, although it does not appear distinctly in the case, this was what the relator deemed to be the cost of reproduction. The assessors, in making up their assessment, took into consideration the value of the entire road and its earning power considered as a whole. It does not clearly appear in the case, the precise theory upon which they acted, but there can be little doubt that they adopted a theory which excluded the idea of the cost of reproduction within their respective towns. The action of the assessors was affirmed by the unanimous judgment of the court. The following are extracts from the opinion:

The argument of the relator's counsel is that this (the relator's right of way) should be assessed as an isolated piece of land, having in substance no beginning or end; that is, not connected with anything at either end beyond the limits of the town. A railroad through the

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town of Hamburg only, having no connection at either end, would be of no value. The erections and superstructure would destroy its value for farming purposes. As a railroad it would have no passengers and no business, and would be worthless. The attempt to use it as such would involve debt and embarrassment, but no profit. In like manner the portion of the Erie canal passing through a single town, with no outlet at either end, would be valueless. A mill-race disconnected from the mill would be of no value. Each item of property, however, with its connections and accompaniments, and used for the purpose and in the manner intended, might be of great value. *Each piece of property is to be estimated in connection with its position, and the business and profit to be derived therefrom.* The road in question is part of a whole, and is to be valued as such. This is independent of the taxation of the capital. It is an estimate of the value of the real estate for railroad purposes, as a mill is to be estimated for its value for milling purposes and not at its value for a church or banking house.

This language clearly negatives the idea of cost of reproduction being the proper standard by which to measure the value of a part of the roadbed of a railroad. It was, however, overruled by the Court of Appeals in the case of the *People ex rel. D., L. & W. R. R. Co. vs. Clapp*, 152 N. Y., at page 496, which case will hereinafter be commented upon.

In *People ex rel. O. & L. C. R. R. Co. vs. Pond*, 13 Abb. N. C. 1, decided in 1882, the General Term of the Third Department of the Supreme Court adopted the opinion of Mr. Justice Potter delivered at Special Term, in which occurs the following language:

The positions occupied by the contestants are practically these: That the relators contend the value should be determined mainly, if not altogether, from the productiveness of its use for the purpose for which it was organized, and the respondents contend that its value is to be determined by its cost.

From the statement of the facts of the case it appears that the railroad company which was seeking to have its assessment reduced, produced evidence concerning its gross and net earnings. Upon this basis it was shown that the value of the road per mile was \$5231. There was situate in the town of Burke, in which the assessment was made

that was reduced, about five miles of the relator's road, so that the assessment should have been substantially \$25,000 upon this basis. The relator was actually assessed at the sum of \$80,000 in this town. Upon these facts the learned Justice said:

Neither contention is absolutely correct. The true rule involves both elements in some degree, and perhaps other considerations. To take the cost of a piece of real estate as a criterion of its value, in very many cases would be unwise and oppressive as the basis of taxation. Many pieces of real estate costing large sums of money and at one time possessing great value, have within the space of a few years ceased to have any considerable value or to be for any purposes desirable. Dependent almost entirely upon the pleasure or profitability of its use, or in other words to what extent it comes up to the standard of value contended for by the relator. Very many costly structures, and rarely any more so than railroad structures, have totally failed to pay any interest or income upon their costs, or even to pay current expenses. Factories, mills, hotels, and private residences are instances of this kind to be found almost everywhere. To ascertain the true taxable value of many kinds of property requires the exercise of a good degree of intelligence and of broad and sound judgment.

The taxable value of a railroad should not be determined alone by the long, narrow strip of land for farming or any other purpose except its use for the bed of a railroad. Nor should the portion of a railroad situated in a particular town be estimated by the cost of any expensive rock cut, or quicksand filled, or a long tunnel located in that town. It should be valued as a part of a whole, a continuous way to carry passengers and freight from one commercial business point to another, and the profits of its use for that purpose. The consideration of profits should have a large, if not controlling, influence upon the value of almost everything, except when considerations of taste or pleasure or comfort are involved. A thing to be worth its cost must be able to pay out of the profits from its use and enjoyment an income bearing some relation to the interest due from an investment or loan of a sum of money equal to such cost, and over and above the loss by wear or waste.

People ex rel. The Albany & Greenbush Bridge Co. vs. Weaver, 34 Hun 321, decided in 1884, by the General Term, Third Department, of the Supreme Court: The Albany and Greenbush bridge had been assessed by the assessors at

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\$225,000. The Special Term reduced the valuation to \$110,000. This determination by the Special Term was affirmed by the General Term. The following is the entire discussion given by it:

The property in question is business property, created for the purpose of earning money. With respect to such property this court has decided that in ascertaining its "full value" its cost may be considered, but the more controlling consideration is its earning capacity. [Citing the Pond case just referred to.] In the present case the court considered its original cost, and what it would cost to re-create it at the present reduced prices of material and labor. It also considered the fact that its cost was enhanced to fit it for railroad service, an expected source of business which was not secured, and which now seems to be permanently lost. The bridge has been doing all the business offered, for a sufficient length of time to afford a fair test of its earning capacity. Under such circumstances it seems to be just to give controlling weight to its earning capacity.

This, of course, is a clear and distinct adjudication that earning capacity when once well established is the controlling rule to be observed in assessments for taxation, at least where the property is all situate within one tax district.

In *People ex rel. Powers vs. Kalbfleisch*, 25 App. Div. 432, decided in 1898, the Appellate Division, Fourth Department, held that a very valuable building which has no market value because no building like it has been sold, should be assessed upon the basis of its earning capacity, with some reference however to the cost of reproduction. The building in this case was the Powers Block in the city of Rochester. Some remarks of the court are worthy of citation. At page 434 it says:

The actual cost of a piece of property is often a fact of great potency in determining its real worth; but it is by no means the only one, and in this particular instance it would prove of little value as a guide, for the reason that the lot upon which the building stands has nearly doubled in its market value since it was purchased by the relator, while the building itself, which was erected at a period when the materials of which it was constructed cost very much more than the same materials would cost at the present time, is obviously worth much less than it was when it was first built. This being the

case, it is apparent that some other and more satisfactory rule of valuation should, if possible, be employed.

Again, at page 435:

If a man possesses a piece of property which has a fixed and certain market value, it is much less difficult to determine what that property is worth in the payment of a debt than would be the case if its face value were fluctuating and uncertain; and, unfortunately, the relator's property belongs to the latter class. It can not be said to have any market value for the reason that there is no other property like it in the city, and consequently none has ever been put upon the market.

Again, upon the same page, the court says:

Eliminating, therefore, all considerations of the market value of the property in question, we find that there remain two other methods of ascertaining its true and full value, and these are the ones which, as we understand it, were adopted by the learned referee. They are, first, its earning capacity as an investment; and second, the probable and natural cost of its reproduction. It is urged by the learned counsel for the defendants that too much prominence was given upon the hearing at the special term to the first of the two methods just mentioned; but we are inclined to think that the net income of a building constructed for commercial purposes and as an investment is an important element in determining its assessable value. For, as was said in an analogous case, "a thing to be worth its cost must be able to pay out of the profits from its use and enjoyment an income bearing some relation to the interest due from an investment or loan of a sum of money equal to such cost and over and above the loss by wear and waste". [*People vs. Pond*, 13 Abb. N. C. 1.] To illustrate, no one would ever think of purchasing the Powers Block for any other reason than because it was a revenue producing investment, and consequently its net income must necessarily bear a ratio to and determine its true value.

In the case of *People ex rel. D., L. & W. R. R. Co. vs. Clapp*, 152 N. Y. 490, decided in 1897, which involved the assessment of real estate of the relator in the town of York, in the county of Livingston, the assessors adopted a method of arriving at the true valuation which was stated by them in their return as follows:

In fixing upon the sum at which the real property was assessed, we considered the same not as a separate piece of real estate standing

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alone, but as a part of the extensive and valuable system of railroads leased and occupied by said relator, extending from the city of Binghamton to the city of Buffalo, and as a part of the extensive and valuable system of railroads operated by the relator, and based our said assessment thereof upon the cost, rentals, and earnings of said railroad as shown by the annual report of said relator to the Board of Railroad Commissioners of the State of New York.

It appeared that the relator gave proof, which was uncontradicted, with respect to the cost of reproducing the seven and one-fourth miles of railroad in the township of York, with the tracks, roadbed, tanks, and buildings, and their total cost was materially less than the sum at which the assessors fixed the value. Upon this state of facts the court said:

It is difficult to formulate from the adjudged cases any general rule or principle applicable in all cases to the valuation of the real estate of a railroad for the purpose of taxation.

After a considerable discussion the court finally says:

The cost of reproducing these seven miles of railroad seems to us to be the just and reasonable rule of valuation. There is no reason that we can perceive for assessing this property at a greater sum than the cost of replacement. It may not in every case be worth what it would cost to reproduce it. That would depend upon the income or earning capacity of the road after it is built. But this is the case of a paying railroad, and, when valued at what it would cost to procure the land, construct the roadbed, put down the ties and rails, and erect the buildings and other structures, all new, it is difficult to see any ground for assessing it at a larger sum. It may in any case be competent to consider all the elements of value that they have considered in this case, but in the end, when they come to make their decision as to value, for the purpose of taxation, it may properly be much less, but can never exceed the actual cost of producing the property in the condition in which it is found by the assessors at the time of making the assessment. Such rule of valuation is reasonable and possible.

The same rule, of course, applies in each tax district of the State, and hence it follows that the rule for assessing the real property of an entire railroad situate within the State of New York is the reproductive cost of the road as it stands.

The court, in referring to the Barker case, 48 N. Y. 70, disposes of it in the following manner:

In so far as they hold that the real estate of a railroad in a town is not to be assessed as an isolated piece of land, but with reference to its position as a part of a line of railroad with all its incidents, including the business and profits to be derived therefrom, they are doubtless correct. The property in question would be worth practically nothing except for its position as part of a railroad system. It has value as part of the whole property and practically no value when detached or severed from it. But the question still remains, what is the reasonable and practical method of estimating that value? Is it by an intricate calculation of the rentals, earnings or profits per mile capitalized, and then followed by arbitrary deductions on account of the greater earning capacity of some parts of the property over other parts, or is it the cost of reproducing the same part of the railroad? The assessors have to deal with actual, visible, tangible property. A railroad may possess things intangible, as privileges or franchises of great value, and that are very important elements in its earning capacity, but the assessors have no power to include them in the valuation of real estate, and any method of valuation which includes them as a part of the real estate is erroneous. The assessment of the real estate upon a basis of profits or income of the whole railroad must necessarily attribute to the real estate a value which should be shared with the personal property and franchises.

This is the leading case in the State of New York giving controlling weight to cost of reproduction as the basis of determining fair or full value. Liberal extracts have been made from the opinion, which however should be consulted in full, for the purpose of showing that the real ground of decision *was not that the cost of reproduction was necessarily a true basis of value, but the only practical and practicable basis*. The theory upon which the case proceeds is that the assessors in the town through which a railroad passes were then required by law to assess only the real estate in their town and to give a value to it. That whenever they undertook to consider the earning capacity of the road they would be confronted with the problem of determining how much was earned by the railroad and how much by the personal property, and how much by the franchises and other intangibles constituting part of the property of the company.

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That the task of making such a determination would be too great for the capacity of the average assessor and would necessarily result in erroneous decisions. That it would be better to confine the assessors to some simple, definite rule of assessment of the real estate in their respective towns, easily applied and which would result in practical justice. Whether the court succeeded in finding a just rule is not the question. It adopted the cost of reproduction, with all its known inconsistencies and absurdities. Thus, in one town, five miles of track may have been constructed upon level ground, at little expense; while in an adjoining town the same amount of track may have been constructed at great expense, including a tunnel, an expensive fill across a deep gorge, or a highly expensive bridge across a river. The portion of the road in the town of lesser expense would be of as great value to the operation of the road as the other, and would contribute as much of its earning power, and yet the assessment might be but one-tenth or one-twentieth part of that in the adjoining town. If there is any rational or consistent theory upon which such discrepant assessments could be justified, it is that of cost of reproduction; but whether the end is accomplished by that sort of assessments is open to doubt.

It must be noted that the opinion of the court, in none of its reasoning, attempts to sustain the position that if the road could be valued as a whole the cost of reproduction would be the controlling factor or even a factor of very much weight.

By section 2 of the Tax Law, certain franchises, rights, authority, and permission are known as special franchises, are made or treated as real estate or real property, and in connection with certain physical structures laid in streets are assessed as real property, pursuant to the provisions of section 43 of the Tax Law. This assessment of a special franchise is made by the State Board of Tax Commissioners.

In the case of *The People of the State of New York ex rel. Jamaica Water Supply Company vs. The State Board of*

Tax Commissioners, 196 N. Y. 39, decided on the 19th day of October, 1909, it was held that the Legislature has not seen fit to prescribe any rule by which the value of special franchises is to be ascertained, and that it is beyond the province of the courts to lay down an exclusive rule of franchise valuation applicable to all cases, although in many cases the application of the net earnings rule would result in a fair and just valuation. At page 51 Judge Bartlett says:

In our opinion it is beyond the province of the courts to lay down an exclusive rule of franchise valuation applicable to all cases. Of course, if there were only one reasonable method of getting at the true value of a special franchise, it would plainly be the duty of the state board to adopt that method. It is conceded, however, that there are many reasonable methods, and it is not for the courts to insist that one shall be pursued rather than another so long as the legislature has chosen to leave them all equally open to the assessing officers.

At page 52 the court cites with approval the language of Judge Earl, as follows:

There is no law or authority which requires assessors, in making assessments, to adopt any certain or fixed rule or method. The only rule for their guidance is the actual value of the property to be assessed, and they may avail themselves of all tests of such value within their reach, and of every fact, and all information which in their judgment has any bearing upon such value.

It should be remarked that this language, thus approved, assumes that there is such a definite and certain thing as actual value, and that if the inquiry in search of it be prolonged far enough and with sufficient diligence the actual value may be ascertained.

On page 55 the court further says:

While, as we have already pointed out, the legislature has not prescribed any exclusive or hard and fast rule for assessing the value of special franchises, we think that in the case of this relator and many other corporations similarly circumstanced the adoption and application of the net earnings rule would result in a fair and just valuation.

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This rule is given by the court on page 56, in the following language:

The net earnings rule contemplates a valuation upon the basis of the net earnings of the corporation which are attributable to its enjoyment of the special franchise. The method is thus applied:

- (1) Ascertain the gross earnings.
- (2) Deduct the operating expenses.
- (3) Deduct a fair and reasonable return on that portion of the capital of the corporation which is invested in tangible property.

The resulting balance gives the earnings attributable to the special franchise. If this balance be capitalized at a fair rate we have the value of the special franchise.

If this rule be applied in ascertaining the valuation of a railroad property as a whole, it is very simple. There is first required to be ascertained the gross earnings. From this amount the operating expenses, depreciation, and taxes are to be deducted. The resulting remainder gives the net earnings, which if capitalized at a fair rate give the true or actual value of the property.

The court does not, however, commit itself to this rule as applicable in all cases. It says on page 55:

There are obviously many cases, however, to which it would not be applicable. Take, for example, the case of a corporation enjoying a special franchise which by reason of mismanagement or other causes had yielded no earnings perhaps for many years; there it might be wholly contrary to the truth to hold that the special franchise of such corporation had no value simply because there happened to have been no earnings by which that value could be measured.

The foregoing six cases are the only New York decisions which need engage our attention. They cover a period of approximately forty years, and give a complete view of the judicial utterances during that time upon the point involved. In five of them the net earnings rule is adopted as the better and fairer basis of assessment, with a recognition in some of them that cost and reproductive cost may be resorted to for information and instruction.

The Clapp case, 152 N. Y. 490, is peculiar in that under the New York law as to the assessment of real property,

the assessors of each town through which a railroad is constructed are to assess only the portion of the road lying within that town. They are not to assess the whole road. As I read the court's opinion, it confines the assessors in exercising their judgment to reproductive cost partly because of the insuperable difficulties attendant upon the application of any other method, and partly because the net earnings rule would allow them to assess franchises and other intangibles of great value which, as the court held, they "have no power to include in the valuation of real estate". The assessors had only the power to assess real estate, and the court debars them from the exercise of the net earnings rule for a reason concisely stated in the following language: "The assessment of the real estate upon a basis of profits or income of the whole railroad must necessarily attribute to the real estate a value which should be shared with the personal property and franchises."

Clearly, this case does not assist us in the least in determining the value of an entire railroad, including real estate, personal property, franchises, and all other elements, if any, which go to make up its value as a going concern.

Fixing value for the purposes of rate making has been discussed chiefly by the United States courts. The leading case in the United States Supreme Court on this question is *Smyth vs. Ames*, 169 U. S. 466, decided in 1898. It is unnecessary to analyze this well known case. It is, however, advisable to quote in full the celebrated statement of Judge Harlan as to the method of ascertaining value, which is as follows:

We hold, however, that the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public. And in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required

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to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience.

This method of arriving at the "value" of the property of a public service corporation has been very extensively cited as well as lauded in unstinted language. It demands analysis and study. The problem is stated by the learned court to be the ascertainment of the "fair value of the property being used by it [the corporation] for the convenience of the public". It then proceeds as follows, the language being divided by me for convenience of reference into numbered paragraphs:

And in order to ascertain that value

- (1) the original cost of construction,
 - (2) the amount expended in permanent improvements,
 - (3) the amount and market value of its bonds and stock,
 - (4) the present as compared with the original cost of construction,
 - (5) the probable earning capacity of the property under particular rates prescribed by statute,
 - (6) and the sum required to meet operating expenses,
- are all matters for consideration and are to be given such weight as may be just and right in each case.

It will be observed that paragraphs numbered 1 and 2 are essentially the same, the only distinction between them being time of construction, and may be summarized briefly but correctly as *cost of property*. Paragraph numbered 4 is nothing more or less than *reproductive cost*, coupled with a suggestion that such reproductive cost should be compared with actual cost. Paragraph numbered 3 calls attention to the *commercial valuation* method of arriving at value. Paragraphs numbered 5 and 6 are only one way of stating *net earning power* as a basis of determining value.

Reduced to concise language and stated in terms having a well known and definite meaning, the court merely says that in determining value the matters for consideration include —

1. Cost of property;
2. Reproductive cost;
3. Commercial value;
4. Net earning power.

It does not limit consideration to these matters, but expressly recognizes there may be others, offering however no indication of what they may be. Merely pointing out what matters should be considered in the decision of a question, by no stretch of imagination can be treated as a rule for determination. We are told we should consider four well known theories for arriving at value, and such other facts as may be material or pertinent, and we are given no further aid except the suggestion that these matters should be given such weight as may be just and right in each case. In this last is the crux of the whole matter. It is beyond question, that if we make reproductive cost the test of value, a result will be reached in the great majority of cases different from that which would follow either from commercial valuation or from capitalization of net earnings.

This is undoubtedly the case in the comparison of any two theories. The capitalization of net earnings will rarely, if ever, produce the same amount as commercial valuation. If one of these methods is adopted in its entirety, such adoption necessarily excludes the others. If all are to be considered, what relative weight is to be given to each? We are justified in inquiring whether there is a definite and defensible principle which can be followed, or whether guess work, speculation, and caprice are the determining factors in any given case. This is the really important point in the working of the so called rule, which analysis discloses not to be a rule but an enumeration of differing and, possibly, discordant theories to be considered.

If we are to call the language under consideration a rule, the test of its value must be found in its working in a concrete case. Taking the case in hand as a fair example, we find that we have no evidence as to the cost of the property, and it is a fair assumption from the facts known to us that

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to ascertain such cost with reasonable precision is impossible. The commercial valuation is an impossibility for the reason that the bonds and stock of the corporations which have owned the property never had any market value. The capitalization of net earnings can not be considered, for in effect there have been no such net earnings. Reproductive cost can be approximated. If the value of property were always equal to reproductive cost, truly a happy state of affairs would exist. There could be no such thing as loss in venture, except from the depreciation by decay or wear of the property itself. A railroad could be built from nowhere to nowhere without business of any kind and yet its value would continue to be what it would cost to reproduce it. Clearly, the case of *Smyth vs. Ames* is not able to aid the Commission materially in the discharge of its duty in this case.

Since the decision in *Smyth vs. Ames*, valuation for the purpose of rate making has engaged the attention of the Supreme Court of the United States in various cases. In none of them, however, have I been able to find any complete and thoroughgoing discussion of the method of valuation which should be employed.

In the case of *San Diego Land and Town Company vs. City of National City*, 174 U. S. 739, the court used the following language:

The contention of the appellant in the present case is that in ascertaining what are just rates the court should take into consideration the cost of its plant; the cost per annum of operating the plant, including interest paid on money borrowed and reasonably necessary to be used in constructing the same; the annual depreciation of the plant from natural causes resulting from its use; and a fair profit to the company over and above such charges for its services in supplying the water to consumers, either by way of interest on the money it has expended for the public use or upon some other fair and equitable basis. Undoubtedly all these matters ought to be taken into consideration, and such weight be given them, when rates are being fixed, as under all the circumstances will be just to the company and to the public. The basis of calculation suggested by the appellant is, however, defective in not requiring the real value of the property

and the fair value in themselves of the services rendered to be taken into consideration. What the company is entitled to demand, in order that it may have just compensation, is a fair return upon the reasonable value of the property at the time it is being used for the public. The property may have cost more than it ought to have cost, and its outstanding bonds for money borrowed which went into the plant may be in excess of the real value of the property. So that it can not be said that the amount of such bonds should in every case control the question of rates, although it may be an element in the inquiry as to what is, all the circumstances considered, just, both to the company and to the public.

This language is subject to the remarks offered with reference to *Smyth vs. Ames*. It gives an enumeration of things which may be considered without determining their relative weight in the decision. It apparently assumes that what is "fair and equitable" is something so plain that it requires no discussion. There seems to be a feeling that fairness and equity are matters which approve themselves to the ordinary mind without reasoning or investigation.

In *Cotting vs. Godard*, 183 U. S. 79, the same court used the following language:

As to parties engaged in performing a public service, while the power to regulate has been sustained, negatively the court has held that the legislature may not prescribe rates which if enforced would amount to a confiscation of property. But it has not held affirmatively that the legislature may enforce rates which stop only this side of confiscation, and leave the property in the hands and under the care of the owners without any remuneration for its use. It has declared that the present value of the property is the basis by which the test of reasonableness is to be determined although the actual cost is to be considered, and that the value of the services rendered to each individual is also to be considered. It has also ruled that the determination of the legislature is to be presumed to be just, and must be upheld unless it clearly appears to result in enforcing unreasonable and unjust rates.

In *Wilcox vs. Consolidated Gas Co.*, 212 U. S. 19, at page 41, the court recites the rule as to the validity of acts limiting the rates for gas, as follows:

The rates must be plainly unreasonable to the extent that their enforcement would be equivalent to the taking of property for public

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use without such compensation as under the circumstances is just, both to the owner and the public. There must be a fair return upon the reasonable value of the property at the time it is being used for the public. . . . In order to determine the rate of return upon the reasonable value of the property at the time it is being used for the public, it of course becomes necessary to ascertain what that value is. . . . The value of the real estate and plant is to a considerable extent matter of opinion, and the same may be said of personal estate when not based upon the actual cost of material and construction. Deterioration of the value of the plant, mains and pipes, is also to some extent based upon opinion. All these matters make questions of value somewhat uncertain; while added to this is an alleged prospective loss of income from a reduced rate, a matter also of much uncertainty, depending upon the extent of the reduction and the probable increased consumption, and we have a problem as to the character of a rate which is difficult to answer without a practical test from actual operation of the rate.

It will thus be seen that as to the value of real estate owned by the gas company, in the case before the court there was no definite rule for ascertaining its value laid down. It was treated as a matter of opinion without indicating, so far as the case discloses, upon what particular fact or facts the opinion was to be based. But there was in the case the question of the value of certain franchises owned by the gas company. Regarding those the court said:

It can not be disputed that franchises of this nature are property and can not be taken or used by others without compensation. The important question is always one of value. . . . But there is, however, no method of valuing franchises except by a consideration of earnings; earnings must be proportioned to assets; and both kinds of assets, tangible and intangible, must stand upon the same plane of valuation; having therefore a measure of growth of tangible assets from 1884 to 1905, the franchise assets must be assumed to have grown in the same proportion. . . . The franchises granted the various companies and held by complainant consisted in the right to open the streets of the city and lay down mains and use them to supply gas, subject to the legislative right to so regulate the price for the gas as to permit not more than a fair return, regard being had to the risk of the business. upon the reasonable value of the property at the time it is being used for the public.

In this case it was claimed by the gas company that the "good will" of the business was property and entitled to be valued as such. Upon this point the court says, at page 52:

We are also of opinion that it is not a case for a valuation of "good will". The master combined the franchise value with that of good will and estimated the total value at \$20,000,000. The complainant has a monopoly in fact, and a consumer must take gas from it or go without. He will resort to the "old stand" because he can not get gas anywhere else. The court below excluded that item, and we concur in that action.

It will not be found useful further to prolong quotations upon this subject. There is not to my knowledge, in any reported opinion, a thorough discussion of what constitutes value. Since the decision of *Smyth vs. Ames*, the courts have found it easy to resort to the sweeping general language used in that case as a rule for ascertaining value, when in fact no rule is given unless saying that everything may be considered without any intimation as to the relative weight and importance of different factors constitutes a rule. Simply naming a large number of unrelated particulars, or of inconsistent particulars, is not and can not be an aid in the weighing of those particulars. Thus, the original cost of construction, and the present as compared with the original cost of construction, are both named as elements for consideration, with the remark, "and are to be given such weight as may be just and right in each case". As to what may be just and right in a given case is just the thing which we are in search of. The courts, in every instance, carefully refrain from indicating it. The same caution upon the part of the courts is manifested in the taxation cases. In the *Jamaica Water Supply Company* case, 196 N. Y., at page 51, the court says:

In our opinion it is beyond the province of the courts to lay down an exclusive rule of franchise valuation applicable to all cases. . . . It is conceded, however, that there are many reasonable methods.

Such a concession as this, to wit, that there are many reasonable methods of getting at the true value of a special

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franchise, does not seem to have been made in the case of *Wilcox vs. Consolidated Gas Company*, where, as before shown, the court said:

But there is, however, no method of valuing franchises except by a consideration of earnings.

It is not believed that any useful result will be gained by further consideration and analysis of decisions of the courts. Enough has been quoted to show that vigorous statements have been made in favor of the rule of commercial valuation, in favor of the rule of net earnings, and in favor of all the leading theories of valuation. That each statement must be weighed with reference to the facts of the case before the court is unquestionably true. It is clear that no general rule for valuation applicable to capitalization cases has been evolved, and hence none that is authoritative and controlling.

The diversity of judicial opinion as to the rule for determining the value of a complex property used as a unit in the public service, for the purposes of taxation and the fixing of rates, apparently leaves the Commission free to investigate as to the proper method to be pursued in capitalization cases. This view is supported by the extreme care manifested in judicial deliverances to make it clear that the method approved in the case before the court may be unsuited to other cases and circumstances. It is, perhaps, not too much to say that the failure of the courts to analyze carefully the problem has left the situation obscure upon principle.

What constitutes "Value":

The different senses attributable to the word "value" do not seem to have been carefully discriminated, with the result that one court apparently speaks of one thing while another has in mind something materially different. It is essential at the outset of any discussion of the subject to ascertain and define with accuracy just what is the exact signification of the term "value". Unless we know precisely what we are to seek, the method of seeking will most likely be defective.

There can be no question that "value," with reference to

the purposes of taxation, fixing of rates, and capitalization, means value in exchange. This was clearly brought out by Adam Smith nearly a century and a-half since, and has remained a recognized truth with all economists since his day. John Stuart Mill, in his *Political Economy*, makes the clear cut statement, "Value, when used without an adjunct, always means, in political economy, value in exchange or exchange value". This distinguished writer makes the following observations, which are quoted as full justification for all the attention to the proper definition of value which it is proposed to give at this time:

Almost every speculation respecting the economical interests of a society thus constituted, implies some theory of value: The smallest error on that subject infects with corresponding error all our other conclusions, and anything vague or misty in our conception of it creates confusion and uncertainty in everything else.

One of the most acute and profound writers on Economics. W. S. Jevons, used language which is believed to be unassailable as to accuracy of principle, and which deserves to be quoted at length. He says [*Theory of Political Economy*], page 77:

Now if there is any fact certain about exchange value, it is, that it means not an object at all, but a circumstance of an object. Value implies, in fact, a relation. A student of Economics has no hope of ever being clear and correct in his ideas of the science if he thinks of value at all as a thing or an object or even as anything which lies in a thing or an object. Persons are thus led to speak of a nonentity as intrinsic value. There are, doubtless, qualities inherent in such a substance as gold or iron which influence its value; but the word Value, so far as it can be correctly used, merely expresses *the circumstance of its exchanging in a certain ratio for some other substance.*

He further says, at page 78:

Value in exchange expresses nothing but a ratio, and the term should not be used in any other sense. To speak simply of the value of an ounce of gold is as absurd as to speak of the ratio of the number seventeen. What is the ratio of the number seventeen?

Of so great danger did he conceive the ambiguities lurking in the word "value" to be, that after sharply calling

attention to what he terms "the thoroughly ambiguous and unscientific character of the term value," he remarks: "In spite of the most acute feeling of the danger, I often detect myself using the word improperly; nor do I think the best authors escape the danger." It may be well to note that this is just what happens in at least some of the judicial utterances based on the use of this word. They use it in what are really different senses.

To make this point clear beyond the chance of mistake, it is well to illustrate it somewhat further. The air we breathe is indispensable to our existence and hence has the highest possible value in use. When we consider it as a utility, its value can not be expressed in terms. It has, however, no exchange value whatever: that is to say, in the ordinary experience of mankind no occasion arises when one will part with some other thing which he possesses in exchange for it. It would be absurd to speak of the value of air in connection with the matters we are discussing, however useful and indispensable it may be to us. Anthracite was known for a considerable time before its use was understood. It possessed every quality then which it now possesses, but it was to mankind a useless black stone and had no value, that is, no one would exchange any money or other commodity for it. Its properties becoming known, people desired to possess it because of those properties, and in order to gain such possession were willing to exchange other things which they possessed for it. The amount of such other things which they will give in exchange is the ratio of the exchange, and such ratio is the value of the anthracite. We may select almost any article of human use or consumption which under ordinary circumstances has exchange value, and a slight change in circumstances will deprive it of exchange value although its utility remains precisely as before. A speedily perishable article, *e. g.* peaches, taken to a great city market, will, under ordinary conditions of demand and supply, exchange in a certain ratio for money, and this ratio or price

is its value. Over supply the market, and the excess beyond what is required to satisfy the demand becomes absolutely valueless and is cast away as worthless. The article remains the same. The value disappears for the simple reason that no one is willing to exchange anything for it. The homely speech of the people expresses roughly the same truth that is contained in the most precise and elaborate reasoning of economists when they say, "A thing is worth what it will sell for".

Without pressing the matter unduly, we may say that value is nothing intrinsic in things, but simply the temporary measure of the general average desire for them at the moment. It is subjective, inherent in the mind which conceives it and not in the object of which it is conceived. The qualities of an object make it an object of desirability to those who have it not and who can not acquire it without parting with something which they have in exchange therefor. The terms on which the exchange is made constitute the ratio of exchange. This ratio is ultimately fixed by demand, and demand is determined by the intensity of desire.

These statements of well settled economic truths are dwelt upon for the purpose of bringing out clearly the fundamental truth that when we inquire concerning the value of a thing in the sense of that term with which we are concerned, our inquiries do not primarily relate to the thing itself or its properties or qualities, but should be directed to the strength of the desire which others than the owner may have for its possession, and which desire is ready to manifest itself in parting with money or other things in order to obtain the coveted thing. The properties or qualities of the thing may, and in most cases undoubtedly should, be taken into consideration in estimating the probable intensity of desire for its possession. They are or may be evidence throwing light upon the subject under investigation but they are not the thing sought. If a promoter were to ask to capitalize the

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air in his electric generating station on the ground of its great and indispensable value in connection with the operation of the plant, the fact upon which he relied would have to be conceded. It would be as necessary and indispensable as the generator or steam engine. It, however, possesses no exchange value: that is, no one would part with any other thing to obtain it, for the good and sufficient reason that it can be obtained without parting with anything.

The simplest inquiry which can be made concerning exchange value or ratio of exchange is that which relates to market value. The term "market value" presupposes that a thing either is transferred from one to another frequently, or that it is one of a class which is being constantly transferred, so that by inquiry we may learn the ratio of exchange in these cases and hence conclude that the particular thing can be exchanged at that ratio, or substantially that. This makes an inquiry into the market value of a thing an inquiry into the ratio of exchange which prevails with reference to similar things. If we wish to ascertain the value of a bushel of wheat, we inquire how strong is the desire of men generally for wheat as evidenced by their willingness to exchange money or other things for it. The utility value of a bushel of wheat is constant and practically knows no change. The exchange value fluctuates constantly. This means that the intensity of desire for the possession of wheat as compared with the intensity of desire for other things varies from day to day, and hence the market fluctuates.

These considerations lead us directly to the crux of the whole matter, which can not be too clearly stated or carefully considered.

An inquiry into the value of a railroad property as a whole is an investigation of the question how much will any person or collection of persons desire to possess the property, and how much of money or other things will they be willing to part with for the sake of such possession. The difficulty attending the investigation is: (1) the property has never

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been, we will assume, bought or sold, so that there is no direct test or evidence of its ratio of exchange for money or other things; (2) it is not one of a class of things which are bought or sold with such frequency or under such circumstances as to afford a fair test of what it would be likely to bring upon exchange or sale.

In short, no direct evidence is obtainable concerning its probable ratio of exchange. The only course open to the investigator is to select those qualities or attributes which in his judgment would create a desire for the property, and then estimate how much that desire would induce a prospective purchaser to surrender for its satisfaction. Different standards for judging of value in this way have been used for the reason that men differ as to what would create the desire for possession and as to its strength measured by desire for other things.

If the inquiry is as to the ratio of exchange of a work of art, the considerations determining such ratio will be found to be of a nature materially different from those controlling in the case of a railroad. The price paid for a site for a home is determined in the mind of the purchaser by reasons which are wholly different from those obtaining the purchase of a site for a factory. In buying a railroad or any interest in a railroad there is no play of sentiment or gratification of an esthetic desire. There is no feeling which actuates the purchaser except the desire of gain. If the purpose is an investment, the matters which appeal to the purchaser and determine the ratio at which he will exchange his money or property therefor are the security of the investment: that is, whether he can at some future time dispose of his interest without loss of principal or at a profit, and the amount of return which he is likely to receive by way of dividends or interest. The purchase may be made for speculative purposes, that is, to sell again after an indefinite interval for a profit. The sole motive is gain, and the calculations in such case are based upon the belief that others will be ready to

give more than the price for which it is now obtainable. The purchase may be made by another railroad corporation, or those interested in another existing railroad property, for the purpose of controlling business, providing greater facilities, reaching new fields of profitable business, or doing away with a ruinous competition. In all these cases the motive is gain. Analyze every possible case, and in every one it will be found that an intending purchaser is influenced solely by the desire of gain. No one wants a railroad or any interest in it for any other purpose. In some form or other the impelling motive for the purchase is to get money either by selling again at a profit, or by dividends, or interest, with a belief that a sale can be made at as much or more than the purchase price. These are truisms, but they need statement in order to bring out clearly the fundamental truth that in seeking to ascertain the value of a railroad property we must inquire into what power it possesses, or is believed to possess, to give gain to a purchaser. It is not a thing which one desires to have for its own sake, like a work of art. It is without any attraction in itself. Its one characteristic which gives it value is its supposed power to yield, directly or indirectly, a money return equal to the investment with a profit thereon. Its value lies, not in what it is, but in what it will produce or what is believed it will produce in money. This is the essential proposition upon which all depends.

Generally speaking, what it will produce in money depends upon its earning power, direct or indirect. To the ordinary investor it is its direct earning power as shown by the excess of its revenues over its expenses. To another road it may be indirect by furnishing business upon which a profit can be made, or by the suppression of a destructive competition. To the speculator, or, perhaps, more accurately, stock gambler, results in many cases are not to any appreciable extent dependent upon the road itself, or its earnings, but upon other conditions which may not be analyzed here even if it were possible.

The variation in market value of the common stock of seven large lines during three selected years was as follows:

	<i>Highest</i>	<i>Lowest</i>	<i>Per cent variation</i>
New York Central.....	147.750	93.750	57.5
Pennsylvania	151.250	106.500	42.0
St. Paul	165.125	98.500	67.6
Northern Pacific	159.500	100.500	59.0
Southern Pacific	139.125	63.250	199.0
Union Pacific	219.000	100.000	119.0
Reading	173.375	70.500	145.0

Translating these percentages into terms of money, we get the following:

	<i>Amount of stock</i>	<i>Value at highest</i>	<i>Value at lowest</i>	<i>Variation</i>
New York Central	\$178,632,000	\$263,928,780	\$167,467,500	\$96,461,280
Pennsylvania . . .	401,084,800	606,610,510	427,134,012	179,476,498
St. Paul	116,848,200	192,119,965	114,602,977	77,516,988
Northern Pacific .	248,000,000	395,560,000	249,240,000	146,320,000
Southern Pacific .	272,402,600	378,980,117	157,644,300	221,335,817
Union Pacific . . .	199,302,300	486,472,037	199,302,300	237,169,737
Reading	70,000,000	121,362,500	49,350,000	72,012,500

It is apparent that such fluctuations as these do not follow fluctuations in the earning power of the roads or any changes in their physical condition. The constant fluctuations between the maximum and the minimum prices, which are well known, emphasize this view which need not be further dwelt upon.

Certain stocks, of which Erie common is a typical case, which declare no dividends and yet have a considerable market value, should not be overlooked. The Erie Railroad Company was incorporated in 1895. Its common stock, now amounting to \$112,378,900, has never received any dividend. Its first preferred has paid dividends during five years, and second preferred during two years. No dividend on either has been paid for the last three years. Both classes of preferred stock amount to \$68,892,400. For the fiscal year ended June 30, 1908, the company failed to earn enough above operating expenses and taxes to pay its fixed charges by \$1,631,887. Yet during all this time the common stock

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has had a market value reaching at times as high as 35. This curious history is instructive in demonstrating that plausible generalizations as to value should not be exempt from searching analysis.

Any consideration of earning power must have in view past, present, and future. It is common experience that earnings of some roads increase, others remain stationary or diminish. Growth of the country served involves growth of business. Competition of new roads may for a time outrun the growth of the country. Sources of traffic, for a time lucrative, may after a time disappear. The Buffalo and Susquehanna traverses a timber region and its principal haul has been lumber. It is known that the timber of this region will be practically exhausted in four or five years and this part of the road's business will be substantially lost. An effort has been made to meet this situation by extending the road to and developing coal mines. What the result will be on the general fortunes of the property, time alone can tell. Within recent years local passenger traffic at points upon the New York Central has been practically annihilated by the construction of parallel electric roads. The loss of profits entailed by this diminution of business decreases to some extent the value of the road. The diminution may, of course, be offset by a growth in other business.

Roads doing a large coal carrying business must at some time face the loss of that business by the exhaustion of the mines. The Delaware and Hudson Company, about 60 per cent of whose freight business is the hauling of coal, has this event in mind, as shown by the purchase of undeveloped mines located a considerable distance from its road.

Certain lines of railroad formerly did a large and profitable business in hauling petroleum, which business was ultimately largely destroyed by the construction of pipe lines. The exhaustion of oil fields has wrought havoc with the value of railroads which at one time were profitable.

It may be well to illustrate somewhat more in detail the factors which give value to a railroad, that is to say, those

things which make it attractive and induce the public to part with its money in exchange for its stocks and bonds. An instructive comparison may be made between two steam railroads subject to the jurisdiction of this Commission: the Delaware and Hudson, and the Buffalo and Susquehanna. The stock of the D. & H. is selling around 172; for that of the B. & S. there is no market. The D. & H. declares 9 per cent dividends. The B. & S. has been facing a yearly deficit of approximately half a million dollars, and within two years has gone into the hands of a receiver. The great difference in the values of the two roads does not lie in the difference in cost of reproduction, since mile for mile upon this basis it is a fair assumption they are of approximately the same value. Some of the factors which make the one valuable and the other comparatively valueless are shown in the following data as to their operations for the year ended June 30, 1908:

<i>Freight</i>	<i>D. & H.</i>	<i>B. & S.</i>
Train-miles per mile of road.....	6,656	2,372
Ton-miles per mile of road.....	2,727,000	698,000
Revenue per ton carried	85 cents	80 cents
Revenue per mile.....	\$19,090	\$4,710
Freight car-miles per train-mile.....	16.28	8.18
<i>Passenger</i>	<i>D. & H.</i>	<i>B. & S.</i>
Revenue per train-mile.....	\$1.07	\$0.51
Revenue per passenger-mile.....	.0242	.0263
Revenue per mile of road.....	3,880.	600.
Operating revenue per mile.....	23,240.	5,430.
Operating ratio, per cent.....	58.54	91.69

The difference between financial success and financial failure lies, as shown by these figures, in density of traffic. The value of an existing road depends directly upon such density and not upon the cost of the road. If cost were the factor which determined the ratio of exchange, it is probable that there would be but little difference between the value of the two roads, mile for mile.

The cost of reproduction may be a very material factor in the fixing of value owing to the fact that it may have an extremely potent influence upon the earning power. A rail-

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road which has nearly reached the point where it must have a renewal of ties, rails, bridges, rolling stock, stations, in short must be practically rebuilt, may so long as the old plant can be kept in service be able to produce as great net earnings as a new plant. For a given year the nearly worn-out road may be as profitable as one in perfect condition. Owing, however, to its shorter lease of life, it would not be as valuable for continuous earning, which is the thing to be considered.

Obsolescence is another factor which can not safely be overlooked. It has played a tremendously important part in electric plants during the past twenty years. Many a piece of machinery has been consigned to the scrap heap which was practically as good as new, but which, in the judgment of the management, had become valueless except as scrap because of the advantage of using an improved machine to do the same work. Locomotives too light in tractive power, freight cars of too small tonnage, passenger cars of antique pattern, against which the public demur although they may be safe and strong, obviously have not a value equal to reproductive cost.

It is unnecessary to pursue this discussion further. In cases where the sole attraction of a property which gives it exchange value, or in other words creates a desire for its ownership, is pecuniary gain, the measure of the desire and hence of the ratio of exchange is clearly the amount of gain which it is believed can be realized. This fundamental consideration indicates that the net earnings rule of valuation, when properly and carefully applied with due regard to all the features of the individual case, is probably the one having the surest support of basic principle. It is also the one which accords with the practice of shrewd, broad minded, successful men of business.

A few observations may be pertinent upon other features of valuation. Regarding the commercial valuation theory, it is sufficient to say that it is wholly inapplicable to a case like the present one, for the reason that the stock and bonds

of the company which owned and operated this road have not now, and so far as we know never have had, any market value whatsoever. The facts, therefore, upon which commercial valuation is based are entirely wanting.

Reproductive cost requires, perhaps, more attention. It should first be noted that there is a clear and broad distinction between capitalization authorized for new construction, in which stock and bonds are to be issued for money and the money expended for materials and labor, and capitalization authorized to purchase completed construction. In the one case stock and bonds are issued in exchange for a definite amount of money which is the standard of value, and which at any and all times has a definite although it may be varying exchange value. The money thus obtained, it is true, is to be invested in materials and labor, but it would hardly correspond with the fact to say that the assembled product is of the value of the money expended. In fact, it is rarely if ever of that precise value. Bankers never loan upon cost alone. Purchasers never buy upon its sole basis. Cost is a matter of the past and an accomplished result. The investor and the purchaser look to future results for the attractive features which induce their decision as to the amount they will loan or the price they will give, which is the real test of value. Whether the article or the construction procured by the money obtained by the sale of stock and bonds is worth as much as the money depends upon many circumstances. It may be wrongly located as to traffic, it may be mismanaged, it may be superseded by improvements, it may be ruined by competition: all of these matters must be considered in arriving at its value. In such capitalization, fluid or floating capital is converted into fixed capital. It is not the same, but always different after the conversion. As fixed capital it may be more or less attractive to others than the fluid capital would have been. It is rarely the same.

For these reasons this Commission has repeatedly felt compelled to sound a note of warning that authorization of stock or bonds which are to be sold for money, and the money

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invested in property, does not indicate that the security afforded by the stock and bonds will be good. Such authorization can not go any further than to indicate that the Commission has exercised all possible care to see that the proper amount of money has been realized upon such stock or bonds; and whether the money is well used or otherwise, whether the investment proves productive or non-productive, is something entirely beyond the control of this Commission and must depend upon the wisdom, foresight, and judgment of the controlling officers of the corporation. The fact that the property in which the money is to be invested, either by construction or purchase, may not be of the value of the money, is what differentiates the present class of capitalization from the class under discussion. In capitalizing an existing railroad the Commission must, so far as lies within its power, say what is the fair value of the railroad itself. If it takes reproductive cost only to be that value, it goes contrary to all experience and all the sound canons of judgment. A lighting plant constructed in the middle of a desert would have no value as such, for the reason that there would be no one to pay the rate or require the service.

If a railroad company has erected at one hundred stations along its line station houses costing fifty thousand dollars each, while houses costing five thousand dollars each would have been ample and adequate, and five thousand dollars is all that the business at each station would pay a fair return upon, it is obvious that forty-five thousand dollars have been sunk in each station. The reproductive value of the stations would be five million dollars, and the actual value of the stations as measured by earning power would be only five hundred thousand dollars. Reproductive cost may differ from the real value by reason of being out of proportion to the volume of business requiring the services of the property to be valued, or by reason of being of such cost that the business can not afford to pay enough to yield a return upon the amount expended. If a hotel building be erected at great cost with a view to renting, the value of the building is deter-

mined primarily by the rental which it will earn. The value is the sum upon which it will return a given percentage of revenue. A person contemplating the erection of such a building makes his calculations upon this basis. Those calculations at the time they were made may have been sound. If so, the building is worth what it cost, since it yields the anticipated returns upon the cost; but, as frequently happens, the return given is so attractive that a competitor steps in. The newer building is a little more favorably located, has more modern improvements, or for some other reason obtains greater favor with the public. At once the revenue of the first building decreases, and instead of getting the percentage of return which was expected, produces a less amount. The value of the building at once diminishes, that is to say, a willing purchaser will pay for it only the sum upon which it will yield to him what he considers to be an adequate return. If he can loan his money at 5 per cent, the building must return to him at least 5 per cent net or he will not buy. The reproductive cost is precisely the same whether the rental returns be great or small. What the property will sell for in market, which constitutes its exchange value, depends upon the rental which can be obtained and not upon the cost or reproductive cost. Such considerations need not be enlarged upon. It is sufficient to say that the reproductive cost is not the one element which makes property attractive to an intended purchaser. The attraction lies in the returns which it will afford.

Legislative rule for fixing value:

The Legislature has very recently determined the rule for fixing the value of property involved in reorganizations of insolvent corporations. By amendments to the Public Service Commissions Law it was declared that the Commission shall determine the amount of capitalization of corporations reorganized under and pursuant to sections 9 and 10 of the Stock Corporation Law, and the amount of the capitalization shall not exceed the fair value of the property involved. The value of the property is to be ascertained by "taking into

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consideration its original cost of construction, duplication cost, present condition, earning power at reasonable rates, and all other relevant matters". The language quoted is from new sections 55a, 69a, and 101a, and definitely determines, so far as the property of reorganized corporations is concerned, that all of the aforesaid matters may be taken into consideration by the Commission required to determine the value.

This rule established by the Legislature for determining value in one class of capitalization cases can well be extended to all capitalization cases coming before the Commission.

Elements for determining value which are present in this case:

The evidence in this case and the records of the Commission place before us the following matters from which we are required to determine the value:

1. Reproductive cost less depreciation.
2. Past earning power of the road, with a general knowledge of the prospects for future growth and business.
3. Price which the property realized at open competitive sale.

These several matters will now be considered.

Reproductive cost less depreciation:

On the hearing, the Commission insisted that it should be advised as to the reproductive cost of the property purchased upon the foreclosure and sale. The applicant, therefore, caused an appraisal to be made by employees of the well known firm of Westinghouse, Church & Kerr Company. The inventory and appraisal are very extensively detailed. The engineer in charge of the same was sworn as a witness and a summary of his evidence is as follows:

Total duplication cost \$862,839.31

He divided the property so valued into that which was not subject to depreciation and that which was subject to depreciation:

Property not subject to depreciation.....	\$26, 736.00
Property subject to depreciation	838, 103.31

Total	\$862, 839 31
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He estimated the depreciation to be \$183,271.48, so that the reproductive cost of the property subject to depreciation he estimated to be \$652,831.84, making a total reproductive cost of \$679,567.84.

There was, however, a very serious reason to believe that in this appraisal the property had not been sufficiently depreciated. The cross-examination of the witness disclosed that he was unwilling to depreciate property more than 60 per cent so long as it was capable of remaining in service. A very considerable amount of evidence was given showing that the condition of the property was extremely bad. A part of the application was for an authorization to issue bonds to be devoted almost wholly to the construction of replacements. One of the applicant's witnesses stated that the general condition of the road from one end to the other was "pretty well run down. The whole road was in the same condition. The overhead construction was poor, just about the same as the rails and joints; the whole thing was, some parts of it, exceedingly poor. The wire was all poor, all in a general run down condition."

Subsequent to the first hearing, the company found it necessary to reconstruct the entire line from Mamaroneck to White Plains; and, as we are advised by our engineer, some of the old material was worthless even for junk. Under these circumstances, at a hearing held August 31, 1911, it was arranged that a re-valuation of the road as to its reproductive cost, less depreciation, should be made by the engineers of the company and the engineer of the Commission. After prolonged investigation they have agreed upon results which will be accepted. These amounts relate to the value of the property as of December, 1909. It is unnecessary to enumerate the details. Their conclusions are as follows:

Power and car equipment	\$237,730.98
Track and way	207,854.00

Total reproductive cost less depreciation, December, 1909 \$445,693.98

This result having been reached by the applicant's own engineer, who had been engaged in reconstructing the road, it is unnecessary to comment upon it further; and it, of course, so far as reproductive cost less depreciation is concerned, must be treated as binding upon the applicant.

Earning power of the property:

The earning capacity of the former Tarrytown, White Plains and Mamaroneck railroad, as demonstrated by actual results, is shown in the following table compiled from the reports of the company and its receiver to this Commission. The earning power of that portion of the road purchased by the applicant herein is also shown in the table from the period the applicant took possession down to the close of the fiscal year ended June 30, 1911. During the fiscal year ended June 30, 1910, the road was, up to December 7, 1909, in the possession of and operated by a receiver. For the remainder of the year it was operated by the applicant.

Year	Miles operated	Operating revenue	Operating expenses	Net operating revenue	Taxes	Operating income	Non-operating income	Gross income	Rentals	Net income available for interest and dividends	Operating ratio, %
		Dolls.	Dolls.	Dolls.	Dolls.	Dolls.	Dolls.	Dolls.	Dolls.	Dolls.	
1896....	5.12	89.81	18,032	9,050	.....	9,050	.....	9,050	.....	9,050	200.77
1897....	7.87	15,314	18,764	3,449	.....	3,449	.....	3,449	.....	3,449	122.50
1898....	9.37	18,272	21,277	3,004	73	3,077	.....	3,077	.....	3,077	117.00
1899....	14.50	39,172	34,421	4,751	1,048	3,703	.....	3,703	.....	3,703	87.87
1900....	17.86	49,701	36,973	12,728	1,794	10,934	.....	10,934	.....	10,934	74.67
1901....	18.69	62,261	56,284	5,977	1,949	4,028	.....	4,028	.....	4,028	90.73
1902....	18.69	65,736	63,281	2,505	1,947	558	.....	558	.....	558	96.51
1903....	20.05	72,933	76,343	3,410	2,193	5,603	.....	5,603	.....	5,603	104.95
1904....	25.33	95,057	93,739	1,318	2,382	1,064	.....	1,064	.....	1,064	99.08
1905....	26.86	106,879	100,046	6,833	2,467	4,366	.....	4,366	.....	4,366	93.65
1906....	26.86	128,548	113,445	15,103	2,666	12,437	.....	12,437	.....	12,437	88.39
1907....	22.83	132,386	144,085	11,699	2,723	14,422	.....	14,422	.....	14,422	105.80
1908....	22.76	137,995	162,734	24,739	2,874	27,614	163	27,451	.....	27,451	117.92
1909....	22.76	144,768	186,487	41,719	3,035	44,754	161	44,593	.....	44,593	123.82
1910(a)....	22.76	80,355	78,441	1,914	1,446	468	374	842	812	30	92.49
1910(b)....	22.76	92,512	75,270	17,243	3,444	13,800	151	13,950	8	13,942	81.30
1910(c)....	22.76	122,848	153,711	19,157	4,890	14,268	425	14,792	520	13,972	89.09
1911....	27.16	228,585	177,856	50,728	9,437	41,292	284	41,576	22,692	18,883	77.80

(a) Receiver's report, July 1, 1908, to December 7, 1909.

(b) Westchester St. R. R. Co.'s report, December 8, 1909, to June 30, 1910.

(c) Combined figures of receiver and reorganized company covering entire year 1910.

The foregoing table requires but little comment or explanation. It is incorrect in the particular that it discloses only taxes actually paid, not those levied and assessed for which the company became liable and which it should have paid. A very large amount of unpaid and back taxes, aggregating \$47,450.78, has been paid by the applicant, which if included in the table would further increase the deficit. The road as a whole, before it came into the possession of the applicant, was a bad loser, saying nothing of depreciation and unpaid taxes. The net deficit, exclusive of the depreciation, unpaid taxes as stated, and fixed charges, for the period 1904-1911, both inclusive, was \$37,872. Since the road has been in the possession of the applicant there has been a marked improvement in gross earnings. This improvement, however, requires some consideration, for in part it arises from a situation which should be detailed with care.

Rate of fare between Mamaroneck and White Plains:

On the 2nd day of March, 1898, the Village of Mamaroneck granted to the Tarrytown, White Plains and Mamaroneck Railway Company a franchise to construct its road through that village. In and by the terms of such franchise the road was permitted to charge a maximum fare of ten cents for transportation from the village of Mamaroneck to the village of White Plains, a distance of approximately seven miles. In pursuance of the terms of this franchise the road was constructed through the village of Mamaroneck, and the franchise itself was sold upon the foreclosure sale to Sutro and is now owned by the applicant. Afterward the company desired to construct a branch line from a point in the village of Mamaroneck upon its line just mentioned, southwesterly through the village into the town of Mamaroneck, and through the town of Mamaroneck to the easterly line of the village of Larchmont, a distance of a little upward of one mile. On the 3rd day of February, 1899, the Town of Mamaroneck granted to the Railroad

company a franchise permitting the use of the Boston Post road for the construction of its branch, but annexed to the franchise was a condition that the company should transport passengers from the easterly line of the village of Larchmont over its line to the village of White Plains for the maximum fare of five cents. Afterward, and on the 25th day of October, 1899, the Village of Mamaroneck granted a franchise for the construction of this branch through the portion of the village of Mamaroneck required for such purpose, along the Boston Post road, and annexed a condition to this franchise similar to the one embodied in the franchise granted by the Town of Mamaroneck. The branch line was constructed pursuant to this franchise, and has been operated upon the terms imposed down to the time the applicant took possession of the road from White Plains to Mamaroneck. It then commenced to charge as the fare from White Plains to Mamaroneck the sum of ten cents, and continued to charge that fare during all the time covered by the foregoing table.

The applicant claims that by reason of a certain provision in the judgment of foreclosure and sale, and by reason of certain proceedings taken pursuant to such provision, that it acquired the line from Mamaroneck to White Plains free from the conditions and obligations of the franchise relating to the branch from Mamaroneck to Larchmont, and that it was entitled to charge said sum of ten cents. Complaint was made to this Commission that the applicant was violating its franchise in charging said sum of ten cents, and after considerable negotiation and discussion it was finally arranged that this Commission should bring a proper proceeding in the Supreme Court against the applicant to procure a judgment requiring it to charge only the sum of five cents. This proceeding was in fact brought upon a complaint which was practically agreed to by the Commission and the applicant, with the understanding that a demurrer should be interposed by the applicant in order to raise the legal question upon which it relied. Such demurrer was interposed and was overruled by both the Special Term and the Appel-

late Division of the Supreme Court, which held that the applicant was bound by the provisions of the two franchises restricting the fare to the sum of five cents, notwithstanding the clause or provision in the judgment of foreclosure and sale upon which the applicant relied as freeing it from the burden of these conditions. Thereafter the applicant availed itself of the privilege of answering the complaint. It did not deny any substantial averment of the complaint, but set up in substance the oppressive nature of the condition and the ruinous financial results which would follow from its enforcement. The case was tried before the Special Term upon those averments. It was alleged in the answer and proved by the applicant upon the trial that the enforcement of the five-cent fare operated very disadvantageously to it. The following are the financial results as given in the evidence and upon which it relies.

The total passenger revenue received by it upon the line from White Plains to Mamaroneck from December 8, 1909, to September 11, 1911, inclusive, was \$96,922.15. The operating expenses, estimated upon the basis of car mileage as compared with the car mileage and operating expenses of the entire road, were \$84,583.65, leaving a net revenue at the ten-cent rate of \$12,338.50, or a net revenue per car-mile of \$0.0308. It claims that if the five-cent fare had been charged, instead of ten cents, assuming that the number of passengers would have been the same, the passenger revenue would have been only \$78,506.94, thus making a deficit in operating the line of \$6076.71, or a deficit per car-mile of \$0.0151. In short, its contention is that for the period named, from December 8, 1909, to September 30, 1911, the enforcement of the condition of the franchises would have turned a net revenue of \$12,338.50 into a deficit of \$6076.71.

The effort of the applicant to free itself from the burden of the conditions in these franchises is conclusive as to its view that the existence of these conditions in the franchise causes a serious diminution in the value of the property, and

no further argument is needed to demonstrate that such is the case. This proposition was conceded by the applicant at various times during the hearings. It practically conceded that no one could tell how much the property would be worth if the franchise conditions are valid and binding upon it at the present time. It also conceded that the value of the road would be very much less than it would be without such conditions restricting its rate of fare.

The trial court decided the case, holding the franchise valid and denying the company relief from its provisions. This judgment has been affirmed by the Appellate Division. We must assume in view of the judgment of the court that the franchise conditions are binding, and treat them as a circumstance of considerable importance in determining the value of the property.

Price realized for property at open competitive sale:

A sale of the entire property of the Tarrytown, White Plains and Mamaroneck Railway Company was had pursuant to a judgment of foreclosure and sale on the 5th day of November, 1909. The judgment of foreclosure directed that the road should first be offered for sale as a whole, then should also be offered for sale in three parcels. Pursuant to such direction, the road was first offered for sale in its entirety and the only bid received therefor was the sum of \$450,000. The referee then offered for sale parcel No. 1 as described in the judgment, and a person representing what may be termed the Third Avenue Railroad company's interests bid for this parcel the sum of \$240,000; Mr. Sutro, acting for the New Haven company, bid \$460,000; there being no further bid it was provisionally sold to Mr. Sutro. Parcel No. 2 was then offered for sale, and the bidding between the New Haven interests represented by Mr. Sutro, and the Third Avenue interests represented by Mr. Middlebrook, was sharp and active, there being twenty-eight bids by each party, and the property was finally struck off to Mr. Sutro for \$365,000. Parcel No. 3 was then offered

for sale, and after some fourteen bids it was struck off to the Third Avenue interests for \$110,000.

The court confirmed the sales in parcels, so that parcels Nos. 1 and 2, the property sought now to be capitalized, were sold to Sutro for the sum of \$825,000. Such purchase was also subject to the payment of other matters: being unpaid taxes, unsettled tort claims, and the like. So far as parcel No. 2 is concerned, the sale was undoubtedly sharply competitive. The bidders had been authorized by their respective principals to get the property as best they could up to a certain maximum limit. It is unnecessary to review the evidence showing that the competition was real. That it was such may be found as a fact from the evidence.

It does appear, however, that at the time of the sale the New Haven road at least, and probably the other bidder, supposed that the property was freed from the burden of the franchise condition. It does not appear that any investigation had been made as to the earning power of the road by either party, and it does not appear that any inventory and appraisal of the road had been made, or any competent engineering estimate made as to its reproductive cost and depreciation. It was undoubtedly known to both parties that the road had proved a financial failure, that it had been in the hands of a receiver, and was unable to pay operating expenses at that time.

It is more than probable that, although there is no direct evidence to such effect, the bidders considered the franchises of the company which were acquired, of value, and were willing to pay for them. The road occupies public highways. Section 55 of the Public Service Commissions Law forbids the capitalization of any franchise to be a corporation and the capitalization of any franchise, or the right to own, operate, or enjoy any franchise whatsoever in excess of the amount (exclusive of any tax or annual charge) actually paid to the State or to a political subdivision thereof as a consideration for the grant of such franchise or right.

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This provision excludes all franchise valuations from consideration in this case, and to the extent, if any, that the applicant has seen fit to pay for the franchises as a part of the value of the property, to that extent capitalization by stock issue must be denied.

Prospective earnings of the company:

As hereinbefore indicated, the probabilities regarding the future earnings of the property are of the highest importance in determining the value of the property, and it therefore becomes essential to forecast to some extent the prospective earnings of the applicant.

Referring to the table showing its earnings for the entire period of operation, we find that in 1904 it had substantially reached its development in mileage. The length of the road that year was 25.33 miles. The length of the road owned by the applicant is now something over 22 miles, but it operates some miles of track owned by another company so that its total mileage operated in 1911 was over 27 miles. The total operating revenues for the years named were as follows:

1904	\$ 95,057
1905	106,879
1906	128,548
1907	132,386
1908	137,995
1909	144,768
1910	172,868
1911	228,585

This, of course, is a very substantial, if not remarkable, increase in operating revenues. Unfortunately, the increase in operating expenses has generally kept pace with the increase in operating revenues. Just why this should be so is not disclosed by any evidence, but it is very clear that until the road went into the hands of a receiver it was badly managed and that the receiver had to contend with an extremely bad situation. After the road came into the hands of the applicant the operating ratio for the year 1911 was

77.80. With the improvements which the applicant is making on the road, and with the general efficiency of operation which ought to accrue from good management, this operating ratio should be reduced very considerably, which would make an improvement in net income even without increase in operating revenues. There is, however, every reason to believe that the operating revenue will continue to increase. It may well be supposed that the operation of the New York, Westchester and Boston railroad from White Plains to New York, with a proper connection between the two roads at White Plains, will increase the business upon the line between Tarrytown and White Plains to a considerable extent. The general growth of that portion of Westchester county through which the road passes ought to increase the density of traffic and diminish the operating ratio.

There is, of course, no way of figuring these matters mathematically. They are simply matters of judgment based upon experience, and it is our judgment that under good management the road can be made to pay some returns. If it were to continue for the next ten years the history of the past ten years, it could not be said that the road had any value whatever, since it has up to within the last year been a source of loss only.

It must not be overlooked that in order to produce additional revenue it has been necessary for the company to rebuild entirely some portions of the road and make large replacements upon other portions. It has now pending before us an application for bonds to the amount of approximately \$200,000 with which to pay for improvements already made and those yet to be completed. If we were to assume a 5 per cent return upon a capital of \$640,000, and an annual depreciation of practically the same amount, there would be required a net income of approximately \$64,000. To have made this return in the year 1911 would require a total of gross earnings of \$273,000 instead of the actual

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amount \$228,000, an increase of some \$45,000, assuming that the operating expenses, taxes, and rentals were the same.

It is idle, however, to speculate upon precise figures. If the applicant were to be allowed to issue capital stock to the amount which it desires, namely, substantially \$900,000, and also is allowed to issue bonds to the amount of \$386,000 for improvements, the total capitalization would be \$1,286,000, a 5 per cent return upon which would be \$64,300 annually. Adding to this a depreciation which must be taken care of out of earnings, we reach an amount of required net income which no evidence in the case and no fact known to us justifies us in forecasting. These speculations, of course, are based upon the returns for 1911, which, as above shown, are not correct owing to the franchise restriction hereinbefore discussed. It may be possible for the company to rid itself of that restriction in the future, either by a reversal of the present judgment or by relief from the Legislature, or in some other manner. However, no speculation can be indulged in upon this point.

Summary of considerations as to value:

Referring now to the matters before us, from a consideration of which we must determine the value of this property, we have, first, a reproductive cost less depreciation of \$445,693.98; second, the past earning power of the road a net deficit from its inception to June 30, 1911, leaving wholly out of consideration all fixed charges and returns upon capital invested, coupled with the reasonable prospect that in the immediate future the loss will be changed to profit to some extent; the net income, however, will be diminished to some extent by reason of the franchise restriction; third, the precise amount which the property realized at open competitive sale was \$682,400.78. It must, however, be found from the evidence, that in making this bid the purchaser took into consideration franchise values which we are not permitted to capitalize, and also rated the physical condition of the road much superior to what it was

found to be. An evidence of this is that it was found necessary entirely to reconstruct a large portion of the road which it was originally supposed could be put in shape with much less expenditure. After full consideration of all these matters, it is the judgment of the Commission that the value of the road at the time of the purchase did not exceed the sum of \$400,000. There are some matters of expense connected with the acquisition of the property which are properly capitalizable and should be added to this sum. It is unnecessary to detail them at this time.

Dissenting Memorandum

SAGUE, *Commissioner*:

My understanding of this opinion is that it contemplates making present and prospective earning power a main test of value, and consequently of the capitalization to be authorized by the Commission.

I disagree with the theory as developed in this case, and believe that too much stress is placed upon the element of earning power and too little on the other items which determine value. The main object of supervision of capitalization by the Commission, as I understand it, is to determine a basis for calculating the fairness of rates and the adequacy of service. It is not primarily necessary for the Commission to fix the value of a property to the investor, or to arrive at a conclusion as to what a business man would consider a fair purchase price. The duty of the Commission is to approve of an amount of capital which can be used in making up an honest balance sheet which can be applied later, either by the Commission or the public, as a basis for determining whether a corporation is giving its customers fair treatment.

The most important basis for capitalization would appear to be the money which has been skilfully and economically invested in the property. That this was the view of the Supreme Court in the *Smyth vs. Ames* case, quoted

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by the Chairman, is indicated by the court's opinion which places "*the original cost of construction*" and "*the amount expended in permanent improvements*" first in the list of elements to be considered as determining the value upon which the reasonableness of rates is to be based.

One of the main elements of earning power must be the rate which a corporation is permitted to charge. Using earning power as a basis for capitalization and later using the capitalization as a basis for fixing rates would involve reasoning in a circle.

In some cases the earning power test might indicate a higher capitalization than the original or reproductive cost would justify, and thus be equivalent to the capitalization of the franchise under which high earnings are obtained. In this case I think the earning power theory is used to reduce the capitalization below a proper amount. Here \$400,000 capital is allowed upon a property for which \$825,000 was paid after a keenly competitive sale, and for which the Commission concedes that the reproductive value less ample depreciation is \$450,000. Clearly the company is entitled to earn a return upon at least \$450,000, and probably upon some additional sum representing the cost of development.

It is impossible to forecast the future earning power of a property with reasonable accuracy. In this case the income after payment of operating expenses increased under the New Haven management from \$14,000 in 1910 to \$41,000 in 1911, nearly three times. With the development of traffic connections, the gross revenue will probably increase rapidly, with a corresponding increase of net earnings. If the present low earning power is used as a basis for reducing capital, it would appear that the corporation might fairly expect permission to increase its capital if a future increase in net earnings appears to justify it. There is, however, no indication in previous decisions of the Commission to show that consent to such increase would be given.

In the Matter of the Complaint of the TRUSTEES OF CHRIST LUTHERAN CHURCH of Germantown (Bingham Mills) against RED HOOK LIGHT AND POWER COMPANY as to failure to extend a line to furnish electricity to the church.

Where an electric light company is operating under a franchise which by its terms requires it to run its main line in such a manner as to reach a certain point in the municipality from which the franchise is obtained, it can not, after constructing a line which does not reach that point, be allowed to urge as a reason for not building the line in the manner required by the franchise that the expense of constructing it, or of constructing another line which would serve the same purpose, is so great that the revenue to be derived therefrom would not justify the outlay.

In such a case the company should be directed either to re-locate and reconstruct its main line so that it shall run in the manner provided for in the franchise, or else to construct and put in operation a new line which shall reach and serve the point in question.

Decided May 1, 1912.

Warren Lasher, Charles H. Coons, and Arthur Boice,
Lighting Committee and Trustees of Christ Lutheran Church, and *E. S. Luckenbach* for complainant.

Albert W. Bailey for respondent.

OLMSTED, *Commissioner*:

Christ Lutheran Church is located at a hamlet called Viewmont, in the town of Germantown, Columbia county. Its trustees state to the Commission that under an agreement or arrangement, as they allege, with the Red Hook Light and Power Company, that company was to run a line and furnish electricity for the lighting of the church. This agreement they state was made with them in the late Winter or early Spring of 1911. In pursuance of the alleged agreement the officers of the church removed therefrom an acetylene lighting system which had previously been used therein,

and in repairing and making alterations to their church installed electric fixtures and wired the church. The acetylene plant was scrapped or sold.

After the church was made ready for the reception of the current, the Red Hook Light and Power Company refused to run a wire to the church or to furnish the electricity. Complaint was thereupon made to the Commission, and it was requested to compel the respondent company to furnish the current.

The respondent, in answer to the complaint, states that it has no record of any verbal or written agreement entered into with the church committee; that the distance between the main line of the company to Christ Lutheran church is approximately $3\frac{3}{4}$ to 4 miles; that the cost of building a line to the church would be about \$1000 per mile, and that the total expense of furnishing the current would be not less than \$5500; that the income from the church and from such customers as might be reached by a line running to the church would not exceed \$126 a year as estimated by the respondent, and that it would be unreasonable to compel the respondent to construct a line of the length of four miles at the estimated expense with so small a prospect of income likely to be derived from the use of it.

On the first hearing held herein on the 16th day of January, 1912, it appeared that some misunderstanding between the officers of the church and the respondent had arisen from the fact that the ownership and management of the Red Hook Light and Power Company had changed during the time that negotiations were pending between the church and that company. It appeared that there had been certain representations made to the officers and committees of the church by former officials or managing superintendents of the electric light company which had been relied upon by the trustees of the church and in pursuance of which they had taken out the acetylene lights and installed the electric apparatus.

The president of the company, who files the answer in this case, took over the management of the company on or about

the 9th day of September, 1910; and it appears that certain of the former managers of the company left its service or were discharged therefrom shortly thereafter. One of these officials, J. H. Sharpe, who was referred to in the statement of George Leary (the president of the respondent) on the hearing as "the former owner of the Red Hook Light and Power Company," seems to have been the one with whom most of the negotiations on the part of the trustees of the church were had. Mr. Sharpe wrote a letter to one of the trustees of the church under date of December 28, 1911, which was produced on the first hearing and placed in evidence. In this letter Mr. Sharpe states that the committee of the church went into the question of building the line very carefully before the order was given to wire the church, and that the vice-president of the respondent at that time took up the matter of building the line, by telephone, with the New York office of the respondent; and on hearing from the New York office telephoned the trustees of the church to go ahead with the wiring of their church and that the line would be run over to the church by the time that the repairs on the church were completed. Mr. Sharpe states that at the time when the agreement alleged by the church trustees was made he had a talk with the officials of the Town as well as with the trustees of the church, and assured all parties that a line would be run to the church.

The statement contained in Mr. Sharpe's letter conforms very closely to the statements made on the hearing by representatives of the church, and undoubtedly reflects with reasonable accuracy the conditions under which the church was wired. These conditions have been stated as a part of the history of the case. They became immaterial to the decision of it as soon as a new factor was introduced in the form of the franchise under which the Red Hook Light and Power Company is transacting its business in the town of German-town. This franchise was produced in evidence during the latter part of the first hearing. It was granted on the 5th

day of June, 1907, by the town board of the Town of Germantown, and is in typewritten form, with the name of the Town of Germantown written thereon in ink. The franchise is in the usual form, granting to one Jonathan T. Rider of Hudson, New York, permission to construct, maintain, and operate conduits, poles, and wires along the streets and alleys of the town of Germantown for a period of fifty years. Then follows in typewriting the following:

This grant is made subject to the provision that in the construction of its said line or lines the said Jonathan T. Rider, his heirs or assigns, shall in the location of said line or lines be and is hereby made subject to the approval of the commissioner of highways of the said Town of Germantown in so far as the location of any pole or poles may be deemed an encroachment upon the directly traveled portion of any public highway.

Following these words there is upon the face of the franchise, written in ink, the following sentence:

Subject to the conditions indorsed on the back hereof.

On the back of the franchise there is written in ink the following:

The said Jonathan T. Rider, his heirs or assigns, shall construct and equip the line or lines ready to furnish light or power to the residents of the town of Germantown, N. Y., on or before the 5th day of June, 1910, otherwise this grant and franchise to be null and void. That in constructing the main line to furnish light and power to the residents of said town the same shall be constructed along the road by and past the Lutheran church in said town.

This franchise was assigned by Jonathan T. Rider to John H. Sharpe on or about the 3rd day of April, 1909, and by John H. Sharpe was thereafter and on or about the 9th day of September, 1910, assigned to the Red Hook Light and Power Company. It is admitted by the respondent that this is the only franchise under which it is operating in the town of Germantown. It is also admitted that the Lutheran church at Viewmont is the only Lutheran church situated within the township of Germantown.

By section 66 of the Public Service Commissions Law the

Commission is given power to order reasonable improvements and extensions of the wires of electric light companies. By the same section (subdivision 5), it is given power "upon its own motion or upon complaint, that the property, equipment or appliances of any such person, corporation or municipality are unsafe, inefficient or inadequate, the commission shall determine and prescribe the safe, efficient and adequate property, equipment and appliances thereafter to be used, maintained and operated for the security and accommodation of the public and in compliance with the provisions of law and of their franchises and charters".

After the production in evidence of the franchise hereinbefore named, the inquiry was directed to the franchise itself and the conditions imposed by it. The respondent raised two objections to the enforcement of the franchise: first, that the indorsements on the back thereof were not made when the franchise was originally granted; second, that the constructed line of respondent is not the "main line" referred to in the franchise.

At an adjourned hearing held on the 31st day of January, 1912, the town clerk of the Town of Germantown appeared with the original town clerk's record upon which the original franchise was entered. Certain of the town officials who were in office when the franchise was granted were also sworn. It appeared beyond question from the testimony that the indorsement on the back of the franchise was placed there when it was originally granted, that it was a part of the original franchise, and was incorporated by the town clerk at the time of entering the franchise upon his book, namely, the 7th day of June, 1907, which is the date upon which, as he testified, he made the entry. It appears that the town clerk in entering the franchise upon his book, instead of using the words which appear upon the face of the franchise "subject to the conditions indorsed on the back hereof," incorporated the conditions correctly in the body of the instrument, and it so appears upon his original record. The respondent

claimed that this in some manner invalidated the franchise. We do not think so. It is difficult to see how the town clerk in entering a franchise upon a book could have done otherwise, unless perhaps he might have written in an exact copy of the franchise and at the foot of the same entered the indorsements made upon the back thereof. We do not think that this was necessary. It would not have altered the plain meaning of the franchise, nor was it necessary to enter it in that way.

It is plain that the franchise was given and received on condition that the main line to be constructed under and by virtue of it should run along the road by and past the Lutheran church.

The respondent can not be charged with want of notice of the terms of this franchise, for in the year 1910 it came to this Commission with a petition in another case, asking for the approval of this franchise and setting it out in full, with the condition in regard to building the line to the Lutheran church included. It further appears that this franchise came into the possession of Mr. Leary, the new president of the Red Hook Light and Power Company, on or about the 9th day of September, 1910.

It appears that when the line was constructed from Bingham Mills, where the respondent has its power plant, to Germantown village and to North Germantown, a route was taken about two miles northerly and easterly of Viewmont where the Lutheran church is located. Mr. Sharpe, in the letter above referred to, states:

Of course the franchise was conditioned that the main line run by the Lutheran church, and when I started to build it from Bingham Mills to Germantown via Peter Dick's corner it was in order to get a shorter cut to Germantown and give everyone better service, and run from the postoffice corner in Germantown to the Lutheran church. The way in which this line was being run was taken up by your supervisor, and I argued with him that so long as the main line ran by the Lutheran church it should not matter whether it ran from the mill to the church and then to Germantown, or first to Germantown and then

to the church, so long as it ran by the church. . . . There was nothing made a matter of record as it was in a friendly talk, and I presume the board had confidence enough in me to believe that the terms of the franchise would be carried out.

Whatever may have been the reason for the construction of the line already built upon a route other than that which leads by the Lutheran church, it is apparent that under the terms of the franchise the main line must go by that church. On the last hearing, counsel for the respondent stated that the respondent ought not to be ordered to build the line to the church on the ground that there was an ambiguity in the franchise. Being pressed to state what this ambiguity was, counsel said:

At the present minute I take this statement from the franchise, that when the main line is built it shall go by the Lutheran church. Now it is an adjudication for courts to know what is the main line. We don't know. The Town doesn't know.

Commissioner Olmsted: It is admitted that there is only one line at the present time that runs through the town?

Mr. Bailey: It is admitted that there is a line built in that town to hold the franchise. Certain building was made in the town to hold the franchise, and that the adjudication of what is a main line or what ought to be a main line is an interpretation of this written instrument which we claim is under the jurisdiction of the Commission. . . . Enough was built to hold the franchise. It does not state they must build on all roads. It doesn't state on what roads they must build; simply that the main line is built. Now, it is true we would probably like to go down to Cheviot, and that may be the main line; but we are not in position and we are not ready to build the main line, if that is called the main line; we are not ready to do it yet. It is not a matter of good business at the present time to so do.

The position taken by the respondent here is that the line constructed and in operation at the present time is not the main line of the company. It is apparent from a map furnished to the Commission by the respondent that the line as constructed reaches the unincorporated village of German-town and the unincorporated village of North Germantown. These two villages seem to comprise the important localities

of the town of Germantown. The hamlet of Viewmont and the hamlet of Cheviot are smaller.

Making use of the ordinary construction of the word "main," it would appear that the line already built constitutes the *main* line.

In this connection it may be said that in a letter written to the Commission under date of January 2, 1912, by the Red Hook Light and Power Company, President Leary gives the conversation had by him with the pastor of the Lutheran church about August 1, 1911:

In the conversation with the pastor I mentioned to him that we would not put a pole line from our *main line* to his church without a guaranteed revenue.

Further on Mr. Leary says:

The cost of extension from our *main line* to the Christ Lutheran church, a distance of not less than $3\frac{1}{4}$ miles, would be about \$1000 per mile, at least. The excavation for pole holes in many places would be in rock. From recollection there are about twelve houses on the road between *main line* and church.

These references would seem to indicate that in the mind of respondent's president at least the line already constructed was the main line of the company. It is certain that it is the only line in the town of Germantown now in use, and is the one by which the power from Bingham Mills is conveyed. We must hold that it is, for purposes of this case, the main line of the company.

It therefore becomes apparent that the respondent should, in accordance with the terms of its franchise, either re-locate and reconstruct its main line so that it shall run by the Lutheran church, or else construct a new line from some point on its present line to the church. The expense of constructing a new line from its present one to the church does not appear to us to have been correctly estimated by the respondent. We believe that it will be much less than the figures which it names: probably not more than \$2500, exclusive of the right of way. Should an arrangement be made

to carry the electric light wire on the telephone poles which now run near the Lutheran church, a much less expense would be entailed. It appeared from the testimony given on the hearing that negotiations were at one time entered into with the Telephone company with the object of obtaining permission to run the electric light wire on the telephone poles. It is possible that these negotiations might be renewed and an arrangement arrived at.

The distances shown by the map above referred to are not as great as those stated in Mr. Leary's letter. It appears that the shortest distance from the present main line to the church is 1.87 miles. This, however, is not by a highway. The distance along the highway which, as the Commission is informed, is most likely to yield a revenue to the respondent is 2.7 miles.

It also appears from the testimony that there are several prospective customers in the vicinity of Viewmont from whom a revenue might be derived in addition to that obtained from the church; but whatever may be the cost of construction or the income to be derived from the line when completed, the terms of the franchise are clear; and in pursuance of them the respondent should be directed, within a reasonable time, not later than the 1st day of July, 1912, either to re-locate and reconstruct its main line so that it shall run by and past the Lutheran church in the town of Germantown; or, as an alternative, to construct a new line from some point on its present line to the church. Should the new line be constructed, it is immaterial whether it should be built as an entirely new structure or whether the current should be carried to the church by making arrangements with the Telephone company to string the wires on the telephone poles. The option should be left to the respondent. The point is, that under the terms of the franchise some line of the company should pass by the Lutheran church; and an order should be entered in the form above suggested which shall direct the respondent company to run a line to that point.

In the Matter of the Complaint of RESIDENTS OF COXSACKIE
v. UPPER HUDSON ELECTRIC COMPANY as to regulation
of voltage of current supplied for light, price of electricity,
and discrimination against Cocksackie.

1. If a charge made by an electrical corporation in one locality is unjust as compared with the charge made by it for like service in another locality, such unjust charge comes within the prohibition of subdivision 1, section 65 of the Public Service Commissions Law.

2. In every case where a respondent electrical corporation makes higher charges in one locality than it makes in another locality and it appears that its cost of service is not lower in the locality where it makes the lower charge, the burden of justification is upon the respondent company.

3. While a given rate for electric service standing by itself may not seem unreasonable from general observation, if in adjacent localities where it is under no greater cost of service the company has put in force a much lower charge, it thereby makes evidence that such given rate in the other locality is too high, injustice becomes apparent, the unreasonableness of such rate is strongly implied while the rate disparity is maintained, and, if the discrimination when complained against has not been justified, such a case falls within the prohibition for unreasonableness as well as for injustice under subdivision 1, section 65, Public Service Commissions Law.

4. Under subdivision 3, section 65 of the Public Service Commissions Law which forbids undue or unreasonable preference or advantage and undue or unreasonable prejudice or disadvantage, the mere assertion of existing competition can not justify a rate disparity as between localities, nor can competition justify one of the competitors in fixing an exceedingly low price for its service in the competitive locality and recouping itself from earnings in non-competitive territory; and in general, under the regulation imposed by the State, competition may not be made the excuse for abuse.

5. When rate disparities are sought to be justified by competition, the company complained of must show that the competitive rate it maintains is one fixed by the competing company; that it has not been an aggressor in the rate competition; that it has at the same time provided adequate service; and that the rate it is obliged to meet in

competition, while yielding to it some profit over assignable cost and assignable income deductions, is unreasonably low as applied to its business and service.

6. By maintaining 15 cent scale rates for commercial lighting in Coxsackie, while in its adjacent Coeymans district it maintains a 6 cent blanket rate for all commercial lighting service, notwithstanding the fact that its competitor in the Coeymans district has fixed and maintained 12 cent scale rates, the respondent, whose cost of service is considerably higher in the Coeymans district than in Coxsackie, has created wide rate disparities wholly regardless of cost differences and regardless of justifiable competition, and by such action is giving undue preference to its Coeymans district customers and subjecting its Coxsackie customers to undue and unreasonable prejudice and disadvantage. Respondent's rates in the two districts are relatively unjust, and under said system of charges the higher Coxsackie rates are relatively unreasonable.

7. Respondent required to remove the unlawful discrimination under order directing that while and to the extent respondent maintains rates in the Coeymans district which are lower than the competing rates established by the competing company in that district it must to the same extent reduce its rates in Coxsackie.

Submitted March 22, 1912. Decided May 9, 1912.

Visscher, Whalen & Austin (by J. Harris Loucks) and
W. R. Church for complainants.

J. M. Sheehan for respondent.

DECKER, Commissioner:

Some thirty-four residents of Coxsackie, an incorporated village, complain of the rates for commercial lighting established and enforced by respondent. These rates, with the number of customers using each rate in December, 1911, in Coxsackie, and in Athens, where these same rates apply, are:

One dollar per month minimum charge for meter customers.

Number of consumers Dec. 1911	Cents per kw. hour	Kw. hour up to	Net rate, cents
10	15	7, net	15
63	14	20, net	14
18	13	25, net	13
38	12	35, discount 5%	11.4

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<i>Number of consumers Dec. 1911</i>	<i>Cents per kw. hour</i>	<i>Kw. hour up to</i>	<i>Net rate, cents</i>
24	12	50, discount 10%	10.8
23	12	75, discount 15%	10.2
8	12	100, discount 20%	9.6
7	12	125, discount 25%	9
3	12	150, discount 30%	8.4
3	12	200, discount 35%	7.8
1	7.5	250, net	7.5
3	7	over 250, net	7

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These are rates for both stores and dwellings.

The consumers in December, 1911, numbered 201 in both places. The number in each place is not shown. Much the greater number take the net rates between 11.4 cents and 15 cents. The largest number taking any one rate is 63, and that, with the 10 using the 15 cent rate, probably includes the bulk in number of the residence lighting, for which service there was charged, roughly calculated, an average of nearly 14.14 cents per kilowatt hour.

The company's main plant has been and is at Coxsackie, where it produces electricity by steam. It also gets current from the Schoharie Light and Power Company, a corporation controlled by the same interests, and some of the current is produced by water power. The company serves Athens, by transmission line of about $6\frac{3}{4}$ miles from Coxsackie, and it also has a transmission line from Coxsackie to Ravena and Coeymans. The distance to Ravena by this line is about 10 miles. Coeymans lies adjacent to Ravena, and both are known as respondent's Coeymans district.

Now, while respondent's rates in Coxsackie and in Athens are as above stated, respondent's charge in Ravena and Coeymans is a single rate of 6 cents per kilowatt hour, and it has there no minimum monthly charge. Its maximum charge in Coxsackie, where its plant is located, is 15 cents, while 10 miles away it charges only 6 cents to the smallest customer, and takes electricity from or via Coxsackie over a maintained transmission line to serve Ravena and Coeymans where the lower price applies.

Respondent claims that the Ravena and Coeymans rate of 6 cents is due to the fact that at Ravena and Coeymans it meets the competition of the Atlantic Light and Power Company. It not only meets the rates of the Atlantic Light and Power Company in Ravena and Coeymans but it goes considerably below those rates. The rates of the Atlantic Light and Power Company in Ravena and Coeymans are as follows:

Minimum charge 50 cents per month.		
<i>Cents per kw. hour</i>	<i>Kw. hour up to</i>	<i>Net rate, cents</i>
12	10	11.4
11	25	10.45
10	50	9.5
9	100	8.55
8	150	7.6
7	200	6.65

Over 200, special contract. But company's price is 6 cents per kw. hour for all over 200 kw. h. Five per cent on bills paid within 10 days after presentation.

The so called residence lighting rates, that is to say for the smaller users, compare about as follows:

Upper Hudson Electric Company in Coxsackie, up to 7 kw. hours, 15 cents; up to 20 kw. hours, 14 cents.

Atlantic Light and Power Company in Coeymans district, up to 10 kw. hours, 11.4 cents; up to 25 kw. hours, 10.45 cents.

Upper Hudson Electric Company in Coeymans district, any quantity, 6 cents.

In Ravena and Coeymans the Atlantic Light and Power Company does not get down to 6 cents until the customer exceeds 200 kw. hours.

In Coxsackie the Upper Hudson Electric Company rate is 7.5 cents for over 200 hours and 7 cents for over 250 hours.

For 100 hours the Coxsackie rate of respondent is 9.6 cents, while in Ravena and Coeymans it is 6 cents; and in these localities the Atlantic Light and Power Company's rate is 8.55 cents.

Respondent claims that the Atlantic Light and Power Company's average rate is 6 cents or lower in Ravena and Coeymans, by figuring in a large special contract between the Atlantic Light and Power Company and The New York Central and Hudson River Railroad Company, and also refers to the Atlantic Light and Power Company's municipal lighting contract. This calculation is improper. The rates here involved are those for the quantities consumed by the general run of consumers. The smaller consumers' rates of the Upper Hudson Electric Company in Coxsackie are $3\frac{1}{2}$ cents above the Atlantic Light and Power Company's rate in Ravena or Coeymans, while in those places the Upper Hudson Electric Company's rate is about $4\frac{1}{2}$ to $5\frac{1}{2}$ cents below the Atlantic Light and Power Company's rates; and taking 100 hours as for lower consumers, the respondent's Coxsackie rate is one cent above the Atlantic Light and Power Company's rate in Ravena and Coeymans, and in those places its rate is $2\frac{1}{2}$ cents below the Atlantic Light and Power Company's rates.

Referring now only to the respondent, its rate in Ravena and Coeymans is 8 and 9 cents below its Coxsackie rates for the smaller users, and $3\frac{6}{10}$ cents below its Coxsackie rate for 100 hour users. For 200 hour users its rate in Ravena and Coeymans is $1\frac{8}{10}$ cents below its rate in Coxsackie.

Respondent's revenue from Coeymans and Ravena is small. The total receipts for 1910 were \$736.98. This includes two flat rate customers. Respondent's president testified that the transmission line from Coxsackie to the Ravena and Coeymans district represents an investment of \$12,000, and states that the receipts at the 6 cent rate constitute a return of $5\frac{1}{2}$ per cent on \$12,000, and a balance of \$76.98 which could be applied to taxes. This takes no account whatever of cost of production or of expense or loss in transmission. On the other hand, the same witness declares that the 6 cent rate applied in the Coeymans district

business (which includes Ravena) affords the company a profit.

The company's bonded debt is \$100,000; its capital stock \$145,000. With floating debt, accrued amortization of capital, and other items, its balance sheet liabilities amounted December 31, 1911, to \$275,327.95, and the balance sheet shows a corporate deficit of \$449.65. During the year ended December 31, 1911, its gross receipts were \$22,276.50; after deducting operating expenses and adding income from other sources its gross income was \$11,353.16. Deducting therefrom interest payments and rent, left it with a net corporate income from the year's operations of \$1762.77.

The complaint in this case alleges that the respondent's Coxsackie electric rates are unreasonable and that the rates charged by the company in the various places served are as a whole unjustly discriminating. Evidence of general character was submitted by both sides upon the question of reasonableness *per se*. This consisted of rates charged in other places by other companies, but was not accompanied by supporting evidence or by argument calling our attention to the reported operations of such other companies in such detail as to assist us greatly in the disposition of that branch of the case. Indeed, under the course taken at the hearings, it may be assumed that the real gravamen of the case consists of the wide disparity in the company's charges at Coxsackie and in the Coeymans district.

Section 65 of the Public Service Commissions Law, in subdivision 1, prohibits unjust or unreasonable charges by gas or electrical corporations. If a charge made by a company in one locality is unjust as compared with the charge made by it for like service in another locality, such unjust charge comes within the prohibition of that subdivision.

Subdivision 2 of the same section forbids a higher charge to one person than is received from another person for a like and contemporaneous service under substantially similar circumstances and conditions. The provisions of this sub-

division might apply to charges for service in separated localities where the conditions and circumstances surrounding the services are substantially similar, but it is unnecessary to consider the application of that subdivision here in view of the broader application of subdivision 3 of section 65.

Said subdivision 3 of section 65 prohibits any such corporation from making or granting any undue or unreasonable preference or advantage to any person or locality or to any particular description of service in any respect whatsoever, or subjecting any person or locality or any particular description of service to any undue or unreasonable prejudice or disadvantage.

Not every advantage or disadvantage is prohibited by the statute, but only such as is found to be undue or unreasonable. It follows that there may be justifiable advantages and disadvantages, and that upon complaint inquiry must be made into the facts and circumstances having material bearing upon the matter in controversy.

In every case where a respondent company makes higher charges in one locality than it makes in another locality, and it appears that its cost of service is not lower in the locality where it makes the lower charge, the burden of justification is upon the respondent company. That rule was followed in this case.

It appears that in the Coeymans district the Upper Hudson Electric Company, the respondent herein, has been operating since the early part of 1903; that it had in effect then for that district substantially the same rates as it has now in force at Coxsackie; that when the Atlantic Light and Power Company began operations there, early in 1907, that company put in force substantially the rates which it now charges, and which are above set forth; that thereupon the Upper Hudson Electric Company put in and has since maintained the 6 cent blanket rate for its services in the Coeymans district while continuing to maintain the higher rates in Coxsackie.

The Atlantic Light and Power Company was lawfully operating in the Coeymans district in the early part of 1907, prior to the taking effect of the Public Service Commissions Law; so decided by this Commission in 1908, upon the rule in *Oswegatchie Light and Power Company v. Northern Power Company*, 1 P. S. C. 2d D. Rep. 350. Since early in 1907 there has been competition between these two companies, the Upper Hudson Electric Company and the Atlantic Light and Power Company, in the Coeymans district.

Such competition does not justify one of the competitors in fixing an exceedingly low price for its service in the competitive locality and recouping itself from earnings in non-competitive territory.

In this case, the Atlantic Light and Power Company put in force a rate schedule which it has consistently maintained, and which after examination of its books by an accountant of this Commission it appears it is now maintaining. Nevertheless, as stated, the respondent competing company is there affording a greatly lower schedule.

The respondent's plant is at Coxsackie. Current secured from the Schoharie Light and Power Company reaches Coeymans via Coxsackie. If the company makes a profit in the Coeymans district, that profit is largely increased in Coxsackie. The respondent must be deemed in a case of this kind to have put in and for five years maintained the 6 cent Coeymans district rate with full knowledge of its cost of service and any profit derived. While a given rate standing by itself might not seem unreasonable from general observation, if in adjacent localities where it is under greater cost of service the company has put in force a much lower charge, it thereby makes evidence that such given rate in the other locality is too high. Injustice becomes apparent, and the unreasonableness of such rate is most strongly implied while the rate disparities are maintained. If the discrimination when complained against has

not been justified, such a case falls within the prohibition for unreasonableness as well as for injustice.

The question here is whether respondent has justified the discrimination which results from a 6 cent rate in the Coeymans district and its 15 cent scale rates in Coxsackie. Its case for justification rests solely upon the competition by the Atlantic Light and Power Company in the Coeymans district. Its 6 cent rate for all metered service in its Coeymans district is not compelled by the 12 cent scale rates of the Atlantic Light and Power Company in that district. If respondent had been merely meeting rates established by the competing company in the Coeymans district, a different case would be presented. With equal rates in the Coeymans district the competition which would benefit the people would be in service; as it is, at least part of that service competition is transferred to the rates. It results that respondent has created a wide disparity in its rates at Coxsackie and the adjacent Coeymans district which is not due to the compulsion of rate competition by the Atlantic Light and Power Company in the Coeymans district.

A public duty to treat all patrons equitably under existing conditions is devolved by the statute upon this and every other electrical corporation. Under the regulation imposed by the State, competition may not be made the excuse for abuse. The mere assertion of existing competition does not justify rate disparity as between localities. When such rate disparity is sought to be justified by competition, the company complained of must show that the competitive rate it maintains is one fixed by the competing company; that it has not been an aggressor in the rate competition; that it has at the same time provided adequate service; and that the rate it is obliged to meet in competition, while yielding to it some profit over assignable cost and assignable income deductions, is unreasonably low as applied to its business and service.

In this case we have no proof that the 12 cent scale rates of the Atlantic Light and Power Company in Coeymans are in fact unreasonably low, but if they are the respondent company has gone much farther and fixed its rate in the Coeymans district far below the scale of the competing company. In fixing its rates in Coxsackie and in the Coeymans district, its cost of service in the latter being considerably higher than in the former locality, the respondent has created wide rate disparities wholly regardless of cost differences and regardless of justifiable competition with the Atlantic Light and Power Company, and by such action it is giving undue preference to its Coeymans district customers and subjecting its Coxsackie customers to undue and unreasonable prejudice and disadvantage. The rates in the two districts are relatively unjust, and under the present system of charges the higher Coxsackie rates are relatively unreasonable.

The respondent company has, in short, perpetrated and perpetuated an unlawful discrimination. Its legal duty is to remove that discrimination. We could rest upon the statute itself, and by order require the respondent to cease and desist from further subjecting its Coxsackie customers to unlawful prejudice and disadvantage, leaving it to determine whether it would raise its Coeymans rate or lower its Coxsackie rates, or by doing both present a schedule free from the violation of law herein found to exist. We think, however, we should go further and determine the extent of the prejudice and disadvantage which is found unreasonable and undue. In so deciding we shall assume that if the respondent was merely meeting the competing Atlantic Light and Power Company's rates in Coeymans its present rates at Coxsackie would not be unjust or unreasonable, in themselves or relatively. It is our conclusion, that while and to the extent the respondent maintains rates in the Coeymans district which are lower than the competitive rates established by the competing Atlantic Light and Power Company,

it must to the same extent reduce its rates in Coxsackie; that is to say, if it maintains a 6 cent rate in the Coeymans district, while the competing company's rate is 12 cents, it must put in and contemporaneously maintain a 9 cent rate in Coxsackie. This example applies to all of the metered quantity rates in the Coeymans district and in Coxsackie. Upon the facts in this case, the respondent should be permitted to raise its Coeymans district rates so that it meets the rates of the competing company there; or if it keeps its Coeymans district rates for any metered service at a lower figure, then to the same extent to lower its Coxsackie charges for like service.

Order should be entered accordingly, with the further requirement that respondent shall report its action in compliance with the order within a specified time.

In the Matter of the Complaint of the BRIGHTFORD HEIGHTS LAND COMPANY against ROCHESTER, SYRACUSE AND EASTERN RAILROAD COMPANY, as to passenger fare charged between Rochester and stop No. 8; as to alleged discrimination in passenger fares comparing stops 7 and 8; and as to alleged discrimination in passenger fares between Culver road in the city of Rochester and the city line.

In the Matter of the Complaint of CERTAIN CITIZENS OF THE TOWN OF PITTSFORD, Monroe county, New York, patrons of stop 7, against ROCHESTER, SYRACUSE AND EASTERN RAILROAD COMPANY as to passenger fare.

From stops 7 and 8 on the Rochester, Syracuse and Eastern railroad to the Court and Exchange Street station the fare is 15 cents. Stop 7 is 5.71 miles from the station at Court and Exchange streets, and stop 8 is 5.84 miles from the same point. The fare from said stops to Culver road, a point within the city 2.25 miles from the Court and Exchange Street station, is 10 cents.

Held, upon the facts set out in the opinion, that such fares are unreasonable and discriminatory, and should be reduced to 10 cents from said stops to the Court and Exchange Street station and 5 cents to Culver road.

Decided June 5, 1912.

Appearances:

Milton E. Gibbs for complainant Brightford Heights Land Company.

McGuire & Wood (by Mr. Wood) for complainants citizens of Pittsford.

Nottingham & Nottingham (by Wm. Nottingham) and *H. C. Beatty* for respondent.

STEVENS, Chairman:

The Rochester, Syracuse and Eastern Railroad Company, the respondent, owns and operates an interurban electric railroad from the city of Rochester to the city of Syracuse.

Its right of way and track end at Culver road, in the city of Rochester, a point about 2.25 miles from that point in the city which is commonly known as the Four Corners. It operates a portion of its trains from Culver road to its Court and Exchange Street station near the Four Corners over the tracks of the New York State Railways under an arrangement with that company.

Its fares are established upon the zone system. Under this system it is not possible to have a uniform rate per mile for passenger service, but the average between ticket offices, as shown by its schedules, is something under 2 cents per mile. The company itself states that it aims at substantially 2 cents as an average. The sum of the local fares between Culver road and Syracuse, a distance of 83.7 miles, is \$1.60, making an average rate of 1.91 cents per mile. Tickets, however, are sold between these points for \$1.45, which is at the rate of 1.73 cents per mile.

Patrons of the road who live in the vicinity of stops 7 and 8, in Zone 2 east of Rochester, make complaint that the rates from stops 7 and 8 to Rochester are unreasonable, excessive, and discriminatory. The situation with reference to these stops is, briefly, as follows: Zone 1 begins at Culver road, in the city of Rochester, and extends a distance of 3.25 miles to the east to a point a short distance west of stop 7, at which point Zone 2 begins and extends 3.25 miles still further to the east. The distances involved in the controversy are as follows: From the Four Corners, the center of the city of Rochester, to Culver road is a distance of 2.25 miles; from the Four Corners to stop 7 is a distance of 5.71 miles; and from the same point to stop 8 the distance is 5.84 miles. Stops 7 and 8 being situate within Zone 2, the rate from those stops to the Four Corners is 15 cents, being 5 cents for the distance in the city of Rochester, 5 cents to Zone 1, and 5 cents to Zone 2. Upon a mileage basis this fare is from the Four Corners to stop 7 at the rate of 2.62 cents per mile; from the same point to stop 8, at the rate of

2.57 cents per mile. The rate per mile to stop 7 is, therefore, 35 per cent above the average local rate between Culver road and Syracuse, and the percentage is a trifle less to stop 8.

The complainants desire the rate from stop 8 into Rochester to be reduced to 10 cents. If this were done, the rate per mile from stop 7 would be 1.75 cents; and from stop 8, 1.71 cents.

The fundamental question presented by this case is very simple. It is whether the charge of 15 cents fare from stops 7 and 8 into the city of Rochester is reasonable or unreasonable, and whether it is discriminatory against the localities as compared with other localities. This question must be determined by a consideration of the distances involved, the rate per mile charged, the rate per mile generally charged in the vicinity of Rochester, as well as elsewhere, for suburban traffic, and the general level of the rates charged by the respondent itself. Taking into consideration these matters, the rate is unreasonable, excessive, and discriminatory. Suburban rates generally are under 2 cents per mile. Suburban rates on other lines extending out of Rochester are, generally speaking, in the neighborhood of 1.75 cents per mile, and in some cases much less. The respondent's own average local rate throughout its line is 1.94 cents per mile. The rate charged by respondent between the two important villages of Newark and Lyons is 1.61 cents per mile; between Clyde and Savannah it is 1.61 cents per mile; between Port Byron and Weedsport it is 1.56 cents per mile; between Fairport and Macedon it is 1.64 cents per mile.

The traffic between stops 7 and 8 and Rochester is very largely in the nature of commuter travel, consisting of heads of families who go to their offices in Rochester daily, and children attending school. Of course there is other and what may be termed intermittent travel, but it is largely regular daily travel which is entitled under well known considerations to the benefit of low rates. The rate now paid is 35 per cent

above the average local rate. In the case of stop 7 it is 50 per cent over the general average rate of 1.75 cents per mile in the vicinity of Rochester. Taking into consideration all of these matters, it is reasonable that the rate of fare from these two stops into Rochester should be reduced to 10 cents, and this can be divided upon the respondent's own zone system into 5 cents to Culver road and 5 cents from Culver road to the Four Corners. This change can be made without affecting its general rate scheme by making Zone 1 extend from Culver road, a distance of 3.75 miles instead of 3.25 miles as at present; and it should be so ordered.

A vast amount of discussion has been had in this case based upon the fact that the respondent's tracks extend to Culver road within the city of Rochester, and its own system commences at that point instead of the city line 1.34 miles east of the Culver road. All of this discussion is irrelevant, for the reason that the existence of the city line and its location, upon the respondent's own theory, are wholly immaterial. It is operating its cars to the Four Corners. What constitutes a reasonable rate to a passenger embarking on a car at stop 7 for a ride to the Four Corners is not dependent in the slightest degree upon the location of the political boundary. Neither is it dependent upon where the respondent's right of way ends and where its trackage right begins. It undertakes to transport the passenger from stop 7 to the Four Corners, or some point between the two, and the sole question is what is a reasonable remuneration for the service rendered under all of the circumstances of the case. If the Legislature changed the location of the city line hereafter, it would not make the slightest difference in the reasonableness of the charge one way or the other.

It is unnecessary, also, to discuss whether the respondent is required by law to carry a passenger from the Four Corners to the city line for 5 cents, instead of only to Culver road. That question is not involved in this case to such an extent as to make it material to the decision.

**In the Matter of the Complaint of EMIL STEDING *against*
THE NEW YORK AND LONG ISLAND TRACTION COMPANY.**

This complaint was brought upon the theory that a franchise, granted by the Highway Commissioners of the Town of Hempstead, Nassau county, N. Y., June 6, 1901, and prescribing a fare condition of five cents for any five miles or less over the route therein described, applies as to such condition to respondent's line running westerly from the village of Hempstead to Belmont Park on or near the New York city line. This line was constructed and is being operated under other franchises, and the line in question is not referred to in the Highway Commissioners' franchise of June 6, 1901. *Held*, that there is no provision in any of the franchises submitted which requires a fare of not exceeding five cents between Hempstead and Belmont Park, whether the distance between such points is more or less than five miles, but no opinion is expressed in this proceeding upon the reasonableness or justice of the ten-cent fare charged by respondent between these points, the case having been submitted wholly upon the stated question of law.

Decided June 11, 1912.

H. Willard Griffiths for complainant.

Arthur G. Peacock for respondent.

DECKER, Commissioner:

In this case the complainant contends that respondent is restricted by a franchise or consent granted June 6, 1901, by the highway commissioners of the Town of Hempstead to a five-cent fare between Belmont Park, in Nassau county, and on or near the line between Nassau county and the city of New York, and the village of Hempstead, under a clause in said franchise providing that the rate of fare "shall not exceed five cents for any five miles or less," and under another clause providing for transfers. The fare charged by respondent is ten cents. Respondent claims that the distance between Main and Front streets, Hempstead, and Belmont Park is 29,000 feet. Complainant contends that the distance is less than five miles. At the hearing, the franchise granted

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by the Village of Hempstead was considered in the case as if it had been referred to in the pleadings. Certain other franchises applying to that route were also introduced in evidence.

The sole question for determination is whether under the franchises actually having application the fare in question should be five cents or ten cents.

At the hearing, some question was raised whether a condition in one or more of the franchises providing for a maximum of ten cents applies to respondent's entire service into the city of New York, but it was pointed out that no such question is involved in the case and that it could be presented only in a complaint before the Commission of the First District.

On June 6, 1901, the highway commissioners of the Town of Hempstead granted to the Mineola, Hempstead and Freeport Traction Company, respondent's predecessor in name, a franchise or consent to operate in the town of Hempstead. This franchise embraced three parts of respondent's line to be constructed within the town of Hempstead: one from the northerly line of the town of Hempstead to the northerly line of the incorporated village of Hempstead, on what was called Washington street; the second from the southerly line of the village of Hempstead to the northerly line of the incorporated village of Freeport; and the third from the southerly line of the village of Freeport to the open water. Neither of these lines refers to the line now under consideration which runs from Hempstead village westerly to the city line at Belmont Park.

The franchise so granted by the highway commissioners on June 6, 1901, contains also the following conditions which are referred to in this case:

And it further agrees that the maximum rate for one continuous passage in either direction over the entire line as herein described shall not exceed ten cents, and shall not exceed five cents for any five miles or less; and that said Mineola, Hempstead and Freeport Traction Company will issue to and also receive from any connecting line or lines, now or hereafter to be built, upon payment of one fare

therefor, said fare to be agreed upon by said railroads, transfer checks or tickets, the fare paid to be divided between the connecting companies in proportion to the distance traveled by the passenger and in no case shall the proportion charged by said Mineola, Hempstead and Freeport Traction Company exceed ten cents, for passage over its entire road, as herein described, and shall not exceed five cents for any five miles or less.

Complainant contends that this transfer clause applies to divisions of respondent's lines as well as to transfers with other companies. The specifications as to agreement upon fares by "said railroads" and divisions of the agreed fare between the connecting companies by restricting the share of the Mineola, Hempstead and Freeport Traction Company to ten cents plainly indicate that the transfer clause applies only to transfers to and received from the road of another company. The restriction in the first part of the above quoted paragraph to ten cents as a maximum and to five cents for five miles or less covers the line or lines operated by respondent within the scope of the franchise.

This franchise does not describe any route running westerly from Hempstead village. The only reference to "roads now or hereafter to be built" is in connection with the transfer to and from a road of another company. We see no grounds for sustaining complainant's contention that this franchise restriction as to five cents fare for five miles or less applies to a line running westerly from Hempstead village to Belmont Park at the city line.

In *Edwards vs. N. Y. & L. I. T. Co.*, 1 P. S. C., 2d D., 127, we held that this franchise does apply between the incorporated villages of Hempstead and Freeport where the line runs through the town of Hempstead upon a route referred to in the franchise. No part of the westerly line from Hempstead to Belmont Park is referred to in this franchise, and we must hold that as to that line the franchise can have no application.

The railroad from the west line of Hempstead village to Belmont Park is covered by a franchise of the board of super-

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visors of Nassau County for the use by respondent's predecessor of a county road known as Fulton street which extends west to the city line and is commonly known as the Hempstead and Jamaica Turnpike. This franchise was granted October 25, 1901. It contains the following condition pertinent to this case:

The rate of fare for a single trip over the whole or any part of Fulton street aforesaid shall not exceed ten cents for one person.

The franchise having been granted by the board of supervisors, the company also applied to the highway commissioners, and on November 25, 1901, it obtained from them a franchise covering the same route. This franchise contained no fare condition whatsoever.

The franchise obtained from the board of trustees of the Village of Hempstead, which was granted June 20, 1901, was upon condition that the line to Freeport and via Fulton street to Jamaica in the county of Queens, with connection to Brooklyn, should be constructed within times specified. A further fare condition applicable to the Fulton Street line is that —

The rate of fare between that portion of the east and west line of said railroad between Hempstead and the junction of Fulton street and the Jericho Turnpike in the county of Queens or any part thereof shall be ten cents for each person, except that the rate of fare in the corporate limits of the village of Hempstead shall be five cents for each person.

There is nothing in these conditions to require a fare of five cents between Hempstead and Belmont Park, whether the distance is more or less than five miles.

Since this case involves only the construction of the franchises above mentioned, no opinion is or can be expressed in this proceeding upon the reasonableness of the ten-cent fare as applied between Hempstead village and any point on this Fulton Street line.

The complaint must be dismissed.

In the Matter of the Complaint of EMPLOYEES OF HAL-COMB STEEL COMPANY of Syracuse *against* SYRACUSE, LAKE SHORE AND NORTHERN RAILROAD COMPANY.

1. Interurban fares between a point within a city and a point without such city are correctly based upon the distance between such points and not necessarily upon the basis of a fare break at the city line, since the carrier operates through and a single service is performed.

2. Respondent's action in increasing its round-trip fare between its terminal in Syracuse and Stop 4 outside of Syracuse from 10 cents to 15 cents held not justified, and the former 10 cents round-trip fare ordered restored, with the option to respondent of putting in effect a one-way fare of 5 cents.

Submitted March 27, 1912. Decided July 12, 1912.

H. H. Farmer, attorney, and *George M. Berry* for complainants.

Nottingham & Nottingham (by William Nottingham) and *H. C. Beatty* for respondent.

DECKER, *Commissioner*:

This complaint is signed by 331 employees of the Halcomb Steel Company, whose works are on the line of respondent's road near the city of Syracuse. They challenge the increase on October 6, 1911, of the round-trip fare between Syracuse and Stop 4, near the steel works, from 10 cents to 15 cents. The one-way fare has been for some years and is still 10 cents, and prior to the date mentioned the round-trip fare specially established for the men who reside in Syracuse and labor at the steel plant was the same as the one-way fare.

Stop 4 is about $3\frac{1}{2}$ miles from respondent's terminal at the common center in Syracuse. At a five-cent one-way fare the rate would be 1.43 cents per mile, and that would be the revenue per mile on a round-trip fare of 10 cents.

The fifteen-cent round-trip rate affords respondent 2.143 cents per mile. The present one-way fare of 10 cents gives the company over 2.85 cents per mile.

The company established its October 6, 1911, fares on a general ruling basis of 2 cents per mile, but in so doing it computed the mileage from the city boundaries, using the nearest multiple of 5 cents to 2 cents a mile. Thus, with its fare of 5 cents in Syracuse it added a five-cent fare for a distance of 0.87 of a mile outside of Syracuse to reach Stop 4. If it had constructed its fare on the distance through from its Syracuse terminal to Stop 4 at the rate of 2 cents a mile, a seven-cent fare would result, and this being nearer to 5 than to 10 cents an actual fare of 5 cents would be made.

The round-trip fare of 15 cents is the cheapest fare applicable under respondent's ticket issues and its tariffs. It sells a book containing \$12 worth of coupons for \$10, and one containing \$5 worth of coupons for \$4.17. These tickets or coupons are higher than the round-trip fifteen-cent fare. Respondent sells commutation books containing 50 single-trip tickets good within 30 days from the date of sale on a basis approximating 1 cent per mile, but the use of the books is limited by the company in its tariff to transportation upon the basis of a minimum one-way cash fare of 15 cents. If this limit were reduced to ten-cent cash fare transportation, and these books could be used by these complainants, the cost of riding between Syracuse and Stop 4 to holders of such books would be reduced to 7 cents per round-trip. This is lower than is claimed by the complainants.

In this case it is testified that a number of the employees cross numerous tracks of the New York Central and Hudson River railroad on leaving the steel works and walk a considerable distance to the Syracuse Rapid Transit line, where they are taken to all parts of Syracuse for 5 cents. The same thing may be done in the contrary direction. About

190 persons use respondent's line daily between Syracuse and stops up to Stop 9. Comparatively few go beyond Stop 4, and the great number are these steel works employees. To avoid overcrowding regular cars, special cars are run by the company at certain times, morning and evening, for the steel works traffic. Respondent contends this involves an added expense of \$26.70 per day, and that the revenue at 15 cents per round-trip is only \$28.50. It overlooks the benefit to its regular cars in that statement and other considerations pertaining to cost, which need not be gone into, since we hold that the respondent may not segregate a special expense which it creates for its own purposes. If, instead, it used its regular cars and they were overcrowded by this steel works traffic, it would be obliged to put on another car, not merely for this business but for all of its traffic demanding transportation. Respondent states that its operating expenses over the entire line of 38 miles, including taxes, average 19.3 cents per car-mile. These special cars generally run full. If a car contains only 40 passengers at 5 cents each, a revenue of \$2 is produced, as against an average expense for the line of 19.3 cents per car-mile for $3\frac{1}{2}$ miles, or 67.55 cents. This is only another way of using revenue and expense figures. The real question, based upon the carrier's whole business and its rate structure and the particular traffic situation here shown, is whether the fare complained of is reasonable.

With a round-trip fare which is more than its regular basis of 2 cents a mile, and a one-way fare which greatly exceeds that basis, we must hold that the complaint relating to the daily traffic here shown has been sustained. A carrier may not add to its five-cent fare within a city another 5 cents for a very short ride outside of the city and justify the total of 10 cents as reasonable because of the fare break so artificially applied. The correct method of computation is over the distance through from the point outside to the point inside the city, since the carrier operates through and

a single service is performed. For years these passengers to and from the steel works enjoyed a round-trip fare of 10 cents. The company has not sustained its burden of justifying the increase to 15 cents. The Commission should require the respondent to restore the former round-trip fare of 10 cents or at its option put in a straight one-way fare of 5 cents.

Order will be entered accordingly.

In the Matter of the Complaint of FRANK A. SHERWOOD
against NATIONAL EXPRESS COMPANY.

1. A carrier's practice of transporting bread and other bakers' products at net weight, with return of container at a low charge, is not a reason for compelling it to extend the net weight principle to all of the traffic or to a particular kind of traffic unless such particular kind of traffic competes with bread or other bakers' products; but the fact that bakers' products are given low rates may be considered in connection with other facts and circumstances in determining the question of the reasonableness of existing rates on other traffic.

2. Commodity rates fixed on laundry at gross weight which are lower than respondent's present merchandise rates applying on that traffic between Sidney and various specified points.

Submitted June 17, 1912. Decided July 16, 1912.

Frank A. Sherwood, complainant, in person.

T. B. Harrison, jr., for respondent.

DECKER, *Commissioner*:

Complainant, who is the proprietor of the Sidney (N. Y.) Steam Laundry, alleges that respondent's rates for the transportation of laundry are unreasonable and unjust and discriminatory as compared with respondent's rate on bread, biscuit, cake, pastry, pies, etc. Complainant's points of shipment from Sidney are Wells Bridge 9 miles, Afton 11 miles, Otego 14 miles, Harpersville 17 miles, and Worcester 42 miles. His laundry shipments are carried by the respondent, National Express Company, which operates over The Delaware and Hudson Company's railroad.

The rates are upon the gross weight of the laundry and its container, and the "merchandise" pound rates apply. Respondent's rates on bread are applied to the net weight, the container being carried free, and charges are assessed under "general specials" pound rates. Where respondent's "merchandise" rate is 40 cents per 100 pounds the "gen-

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eral specials" rate is also 40 cents; where the "merchandise" rate is 50 cents or 60 cents per 100 pounds, the "general specials" rate is 10 cents less. Prior to September 1, 1910, the "merchandise" rate to all of the points above mentioned, except Worcester, was 40 cents per 100 pounds. On that date the "merchandise" rate of 40 cents was increased to 50 cents per 100 pounds, and since that time the rates have been 50 cents to all of the points above mentioned, except Worcester. The "merchandise" rate to Worcester has been and is 60 cents per 100 pounds.

Complainant receives laundry in his containers or hampers and returns the basket or hamper filled with the laundered material, so that he has no occasion for the return of an empty container. Bread and other bakers' products are shipped out at net weight, and the container is returned at a special low charge. The charge for the return of the container of bread, biscuit, cake, pastry, pies, etc., is 5 cents per container when no collection or delivery service is required, or 10 cents when such service is used. If — with bread — biscuit, cake, pastry, pies, or ice cream cones are shipped, "merchandise" rates apply, but the charge is determined according to the net weight. The standard container for both laundry and bread weighs approximately 30 pounds. The following tables are upon the basis of 70 pounds, net weight, for bread, and 70 pounds, net weight, for laundry, with the 30 pounds for the container added:

COMPARATIVE RATES PRIOR TO SEPTEMBER 1, 1910:

<i>Laundry</i>		<i>Bread</i>	
To Sidney.....	\$0.40	From Sidney, 70 lbs. at \$0.40....	\$0.28
From Sidney.....	0.40	To Sidney, empty container.....	0.10
Total	\$0.80	Total	\$0.38

SINCE SEPTEMBER 1, 1910:

<i>Laundry</i>		<i>Bread</i>	
To Sidney.....	\$0.50	From Sidney, 70 lbs. at \$0.40....	\$0.28
From Sidney.....	0.50	To Sidney, empty container.....	0.10
Total	\$1.00	Total	\$0.38

RATES TO AND FROM WORCESTER:

<i>Laundry</i>		<i>Bread</i>	
To Sidney.....	\$0.60	From Sidney, 70 lbs. at \$0.50.....	\$0.35
From Sidney.....	0.60	To Sidney, empty container.....	0.10
Total	\$1.20	Total	\$0.45

The American and National Express Companies have in effect the following commodity rates on laundry:

Between Cazenovia and Fayetteville, distance 10 miles, 30 cents per 100 pounds. The "merchandise" rate between these points is 50 cents per 100 pounds, and the "general specials" rate is 40 cents per 100 pounds.

Between Chateaugay and Rouses Point, distance 42 miles, the commodity rate on laundry is 40 cents per 100 pounds, the "merchandise" rate is 50 cents, and the "general specials" rate is 40 cents.

Between Syracuse and Watertown, distance 73 miles, the commodity rate on laundry is 50 cents per 100 pounds, the "merchandise" rate is 60 cents, and the "general specials" rate is 50 cents.

Because the respondent takes shipments of bread and other bakers' products at net weight and returns the container at a low price is not a reason why it should be compelled to extend the net weight principle to all of its traffic or to shipments of a particular kind of traffic unless it appears that such particular kind of traffic is shipped in competition with bread or other bakers' products; but the fact that the rates themselves on bread are low may be taken into consideration in connection with other facts and circumstances in determining the question of the reasonableness of the rate on laundry. The respondent, together with its affiliated company, the American Express Company, has made effective heretofore commodity rates on laundry less than the regularly established merchandise rates from and to various points.

The laundry traffic is a regular traffic and furnishes full revenue in both directions. We do not think that laundry should be carried at net weights because a particular container is furnished for it, but we are satisfied that the rates as applied to the gross weight are too high. A commodity rate of 30 cents per 100 pounds applying in each direction

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between Sidney on the one hand and Wells Bridge, Afton, Otego, and Harpersville on the other, and a commodity rate of 40 cents per 100 pounds applying in each direction between Sidney on the one hand and Worcester on the other, would be in our opinion reasonable and just. These rates for the double service on laundry would furnish much greater revenue than is now afforded by the rate on bread and the return of the container, and for the one-way service they would also be somewhat higher than the rates on bread. These rates are similar to the commodity rates on laundry above shown to be in force between other points.

An order directing the company not to exceed such rates as maxima should be entered.

In the Matter of the Application of CENTRAL HUDSON GAS AND ELECTRIC COMPANY for leave to issue approximately \$740,000 par value of its authorized capital stock for the refunding of \$525,000 par value of underlying mortgage bonds of Poughkeepsie Light, Heat, and Power Company, and for reimbursement of moneys actually expended from income or from its corporate surplus or reserve.

1. Applicant's request for leave to restore to its fixed capital account the sum of \$455,466.79, which was required by the Commission to be taken therefrom as necessary to correct accounting and as a condition of its approval of the consolidation of certain companies under the name of the applicant, and which condition was duly accepted before issuance of order in the consolidation case, denied.

2. Respondent, subject to the Public Service Commissions Law, may not issue stock for any purpose whatsoever except upon the order of the Commission; and this Commission may only approve an issue of stock for the purposes enumerated in the capitalization sections of the Public Service Commissions Law.

3. The payment of dividends is not one of the purposes for which capital stock may be issued under the Public Service Commissions Law. *Matter of Babylon Electric Co.*, 1 P. S. C., 2d D., 132, and *Matter of Erie Railroad Co.*, 1 P. S. C., 2d D., 115, cited and reaffirmed.

4. An issue of stock in order to establish a benefit fund for employees is not a purpose of capitalization enumerated in the Public Service Commissions Law, and stock may not be issued for such purpose.

5. The clause in the capitalization sections of the Public Service Commissions Law relating to stock or bond issues for the purpose of reimbursement of moneys actually expended by a company from income or other treasury funds, except for maintenance of service or replacements, added to the law in 1910, refers to property acquisitions or property improvements or betterments, and in no sense to the absorption of a company's book surplus by the issuance of stock as a dividend or of stock to obtain moneys with which to set up a benefit fund.

6. An order authorizing an issue of stock for the purpose of reimbursing the treasury of a company for moneys expended from income in improvements or the betterment of its properties will provide for the sale of such stock at not less than the par value thereof in order actually to reimburse the treasury for moneys so expended; and when such moneys have been so restored to the treasury of the com-

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pany its board of directors may then determine whether or not such moneys may properly be used for dividend purposes.

7. In acting upon an application for an issue of stock or bonds and the sale thereof to reimburse the applicant company's treasury for moneys expended from income upon improvements or betterments or the acquisition of property, it is the duty of the Commission to exclude the cost of replacements and maintenance charges, and whether and to what extent the property of the company has depreciated is a question bearing directly upon the amount which may properly be allowed for reimbursement purposes.

8. Whether a consolidated company is entitled to an order authorizing the sale of stock to reimburse its treasury for moneys expended from income prior to the consolidation by one or more of the constituent companies depends upon the conditions surrounding the consolidation and whether such issue of stock is affected by the provision in the Public Service Commissions Law limiting the capital stock for a consolidated company.

9. The applicant, a consolidated company, asks leave to issue stock for reimbursement of its treasury, and bases its application upon a claim that its constituent companies had expended from income prior to the consolidation moneys for the improvement and betterment of their properties; but the Commission holds, under the conditions surrounding the consolidation, that an issue of stock for such purpose based upon the surplus of one or more of the constituent companies would be unlawful as relating to the contract or agreement for consolidation or, at least, as resulting because, and as a direct result of, and indissolubly connected with, the consolidation itself.

10. The report of an engineer appointed in the consolidation case to inventory and appraise the property of the applicant with a view to determining the fixed capital of the company and for the purpose of enabling a distribution of fixed capital into the proper accounts, the effort being to determine the approximate actual cost of the company's property, discussed, and *held* that the applicant is not entitled upon its present application to reimbursement on account of moneys therein stated to have been expended for additions or betterments, and that its said application must be denied.

Submitted April 9, 1912. Decided July 16, 1912.

John L. Wilkie for the applicant.

DECKER, Commissioner:

The Central Hudson Gas and Electric Company is before the Commission by petition asking for reimbursement of its

treasury under section 69 of the Public Service Commissions Law to the amount of \$216,000.

It claims that such reimbursement should be permitted because it alleges a corporate surplus existing on October 1, 1911, of \$308,150.43, and that the said last stated sum has been expended from income for property acquired during five years preceding the application.

Revision of Fixed Capital Account

Connected with this application is a memorandum filed by counsel for the company asking in substance that the order of the Commission of July 5, 1911, requiring the reduction of the company's fixed capital account by \$455,466.79 as a condition of its approval of the consolidation of the Poughkeepsie Light, Heat and Power Company, Newburgh Light, Heat and Power Company, and Hudson Counties Gas and Electric Company, be amended so as to restore items making up that sum to the fixed capital account. During the investigation relating to the application for leave to consolidate, the accounts of the constituent companies were carefully examined by accounting examiners of the Commission in connection with the inspection of the physical properties by our engineer. Such investigation showed improper fixed capital items to at least the amount stated, \$455,466.79. Another item of \$15,000 (reduction from \$25,000) represented Cornwall Telephone Company's stock. The \$25,000 was directed to be charged as an investment at \$10,000. This \$15,000 reduction was offset by certain other items transferred to the investment account, making the net reduction of assets in the balance sheet \$462,169.17. Such correction of accounts was submitted to the applicant and the constituent companies and duly accepted. That is to say, the entire revised consolidated balance sheet was so accepted and became an integral part of the case, and an essential condition upon which the consolidation was approved by this Commission. The proposal of the applicant consolidated company as set forth in

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said filed memorandum is to the effect that this revision of accounts so deemed necessary by the Commission be abandoned and the order approving the consolidation modified accordingly. The Commission said in its opinion rendered respecting consolidation:

The necessity for a revision of accounts at this time is demonstrated by the fact that it would be practically impossible to require such revision after a consolidation.

The reduction of the fixed capital account so required by the Commission in the consolidated case was necessary to correct accounting. The practice condemned retained in that account large amounts of property which had been replaced or retired from service. On the other side of the ledger a fictitious depreciation reserve was set up partially covering these retirements or replacements. Whatever the intention may have been, the result was gross misstatement of actual property conditions. Notwithstanding the demonstration so made, the company now takes the surprising position that the old charges to fixed capital account should be restored.

The basis of the consolidated company's accounts having been definitely settled, and as a condition of permitting the consolidation such correction of accounts having been accepted by the company, the proposal contained in the filed memorandum must be denied.

Stock Dividend and Treasury Reimbursement

The balance sheet for the consolidated company so approved as one of the conditions of approval of the consolidation was as of December 31, 1910.

The total corporate surplus shown in such balance sheet was.....	\$271,943.64
The company shows an additional surplus for the succeeding period up to October 1, 1911, of.....	36,206.79
and therefore a total surplus of.....	<hr/> \$308,150.43

Of this surplus the company desires to use

for a stock dividend..... \$116,000.00

and for a benefit fund for

its employees 100,000.00 216,000.00

Leaving a balance in surplus account as so

stated of \$92,150.43

The prayer of the petition covering said sum of \$216,000 reads as follows:

The issuing to your petitioner of approximately \$216,000 par value of its capital stock for the reimbursement of moneys actually expended from income or from its corporate surplus and reserve.

But the petition also contains the following declarations:

1. That your petitioner's stockholders are beneficially entitled to its said corporate surplus or to the use thereof.

2. That your petitioner desires to distribute a portion of the same among its stockholders, but deems it inexpedient to distribute the same in cash, as the amount of working capital would thereby be diminished and the financial standing of your petitioner would become impaired.

3. That it has seemed wise to your petitioner's board of directors to capitalize a portion of such corporate surplus into shares of its authorized common capital stock to the amount approximately of \$216,000, leaving approximately \$92,000 uncapitalized.

4. That of such \$216,000 par value of capital stock it is intended to distribute approximately \$116,000 as a stock dividend of 10 per cent to its stockholders of record, and place the balance, namely approximately \$100,000 par value, in the hands of trustees to be used for the benefit of its employees at such times and in such amounts as shall be set forth in the agreement of trust relating to the same.

5. That it has seemed expedient to your petitioner to issue and dispose of said stock in this way for the purpose of reimbursing the expenditure aforesaid, instead of declaring and paying said surplus as a dividend and then having a re-subscription for an equivalent amount of capital stock.

The clauses of the petition, numbered above for convenient statement, apparently disclose an intention to avoid bringing into the treasury of the company moneys which it alleges as equivalent to an amount that it has expended from income

for improvements and betterments of its property, but to distribute to stockholders part of the stock obtained for the reimbursement purpose and use the remainder for the creation of the beneficial trust.

The company may not issue stock for any purpose whatsoever except upon the order of this Commission.

This Commission may only approve an issue of stock for the purposes enumerated in the capitalization sections of the Public Service Commissions Law.

The rulings in relation to dividends in matter of *Babylon Electric Co.*, 1 P. S. C., 2d D., 132, and in matter of *Erie Railroad Co.*, 1 P. S. C., 2d D., 115, to the effect that the payment of dividends is not one of the purposes for which capital stock or obligations in the form of dividend warrants may be issued under the Public Service Commissions Law, are here cited and reaffirmed.

The purpose above stated, to issue stock in order to establish a benefit fund for employees, though entirely commendable in itself, is not a purpose of capitalization enumerated in the Public Service Commissions Law, and stock may not be issued for such purpose. The company is entitled, of course, to create from its income a trust fund for the benefit of its employees whenever it may desire.

The clause in the capitalization sections of the law (55, 69, and 101) relating to stock or bond issues for the purpose of the reimbursement of moneys actually expended by a company from income or other treasury funds, except for maintenance of service and replacements, which was added to the law by amendment thereof in 1910 after the decisions above cited were rendered, refers obviously to property acquisitions or property improvements or betterments, and in no sense to the absorption of a company's book surplus by the issuance of stock as a dividend or of stock to obtain moneys with which to set up a benefit fund. The whole section (55, 69, or 101) discloses no authority for an issue of stock or bonds as reimbursement other than for one of the purposes enumer-

ated in the section, and from them replacements and maintenance are carefully excepted. It follows that the special purposes above stated are not among those for which stock or bonds may be authorized by this Commission.

The Commission is advised that steps in the nature of declaring or attempting to accomplish a stock dividend as the result of this proceeding have been taken by the applicant company. For that reason it is deemed important here to define clearly the application of the reimbursement clause of the statute and its non-relation to dividends. In this case, the applicant being without authority to issue stock for any purpose without the approval of the Commission, may not declare a stock dividend. If we approve an issue of stock to reimburse the treasury of the company for moneys expended from income on improvements or betterment of its properties, such issue of stock will be authorized for sale at not less than par value in order actually to reimburse the treasury for the moneys so expended. When such moneys have been restored to the treasury of the company the board of directors may then determine whether or not such moneys may properly be used for dividend purposes. While it is true that stock authorized to be issued and sold for account of reimbursement may be sold to stockholders of the company and the proceeds immediately declared as a dividend to the stockholders of the company, and so amount in substance to the distribution of the stock so authorized among the stockholders, that would result from action taken in full accordance with law and because of the issuance of stock for a purpose prescribed in the law, namely reimbursement. For the reasons above stated it could not be in legal contemplation a stock dividend.

If and when we shall find that the company is actually entitled to issue stock to the amount of \$216,000 or any amount for the purpose of reimbursing its treasury, it will upon our order be entitled to issue stock to the amount in par value so determined for the purpose of reimbursing its

treasury, and then to dispose of such stock for not less than its par value in order to bring about such reimbursement of its treasury.

The statute, as governing capitalization prior to 1910, was defective, in that a company subject to its provisions was unable to return to its treasury by a stock or bond issue moneys which it had expended from income for improvements or extensions, although it could have applied for and have obtained authority to issue stock or bonds for such improvements or extensions before they were made, or for refunding or discharging obligations incurred for such improvements or extensions previously made. The clause added to the law in 1910 providing reimbursement of the company's treasury for moneys so expended from income was carefully drawn and intended to exclude replacements or maintenance charges. A company might show certain expenditures for improvements or betterments while nevertheless its property included in fixed capital might have been so impaired by damage, failure to maintain, or general depreciation that no actual improvements or betterments had been made, and no proper ground for reimbursement by the issuance and sale of securities would appear. *Binghamton Light and Power Co. v. P. S. C.*, 203 N. Y. 7.

The plain intent of the law as it now stands is that companies shall be entitled to issue stock, bonds, and other evidence of indebtedness only for the comprehensive purposes enumerated in the statute when the same, after investigation by the Commission, shall appear to be reasonably required. This fully satisfies the real financial requirements of the companies subject to the law, and excludes from action wholesale dividends by stock issues, dividend warrants, or certificates of indebtedness based upon assumed possession of property according to a surplus often erroneously stated upon a company's records. The stock dividend evil has been, let us hope, forever banished from the transactions of public service corporations in the State of New York.

Reimbursement to Consolidated Company of Moneys Previously Expended by Constituent Companies

The applicant's claim for reimbursement is for	\$216,000.00
It claims to have expended from income for improvements and betterments since December 31, 1910 (the date of the revised balance sheet set forth in the consolidation case)	36,206.79

This leaves a balance of \$179,793.21
as pertaining to accounts of the constituent companies which existed prior to the consolidation.

In other words, this consolidated company, the Central Hudson Gas and Electric Company, is here seeking reimbursement for moneys claimed to have been expended on improvements and betterments by its constituent companies, Poughkeepsie Light, Heat and Power Company, Newburgh Light, Heat and Power Company, and Hudson Counties Gas and Electric Company, prior to the consolidation. This presents a question calling for serious consideration. If we assume that under section 9 of the Business Corporations Law this consolidated company succeeded to all of the rights, franchises, and privileges of each of the constituent companies, and such appears to be the intent of that section, we have still to consider whether in this case the new company is not estopped by other provisions of law and the consolidated agreement itself from asking reimbursement on account of any surplus shown on the combined books of the constituent companies at the time the consolidation took place.

Section 69 of the Public Service Commissions Law provides —

Nor shall the capital stock of a corporation formed by the . . . consolidation of two or more other corporations exceed the capital stock of the corporations so consolidated at the par value

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thereof, or such sum and any additional sum actually paid in cash; nor shall any contract for consolidation . . . be capitalized in the stock of any corporation whatever.

The capital stock of the three constituent companies aggregated \$1,100,000. The Commission in the consolidation case allowed this as the capital stock of the consolidated company, with an addition of \$450,000 to take up certain debenture bonds of the Newburgh and Poughkeepsie companies. The new company provided in its articles of incorporation for an authorized capital stock of \$2,500,000, but as stated the capital stock to be issued by the new company was limited in the consolidation case to \$1,100,000, the sum of the stocks of the constituent companies, together with a permissive authority to retire certain debenture bonds of two of the constituent companies by an issue of \$450,000 additional stock.

December 31, 1910, the books of the constituent companies showed the following corporate surplus statements:

Poughkeepsie company	\$202,104.63
Newburgh company	73,423.86
Hudson Counties company	50,108.47

Total \$325,636.96
 The Commission reduced this in the revision of accounts to \$271,943.64.

At no time prior to the date of consolidation did either company seek to avail itself of the privilege to apply for reimbursement on account of expenditures from income for improvements and betterments under the reimbursement clause inserted in the law and made effective June 14, 1910. That there was no such intention prior or at the time of consolidation is shown by the brief of counsel in which he states the necessity for consolidation because of the poor financial condition of the companies, as follows:

We have shown *supra* the security situation of these companies, each with closed mortgages; we have also referred to the fact that both

the Newburgh and Poughkeepsie companies have unsecured debenture issues of \$300,000 and \$150,000 each, largely held by the stockholders, who practically had to subscribe for them, and the market for these securities is closed. Our capital stock has not paid sufficient dividends in the past *to make an increase at the present time one that would be subscribed for*, and this Commission has in connection with the application of one of these companies refused to permit a preferred stock issue entitled to dividends at more than the legal rate of 6 per cent, which makes such a security issue one that can not be sold.

In this situation there has been practically no alternative method that we can see to finance the company's needs but to consolidate our companies, place a new refunding mortgage upon the entire properties, and issue bonds under that mortgage for the requisite needs. (Page 29 of brief.)

We submit that the Commission approve the consolidation of these three companies *under the terms of the consolidation agreement, authorizing the exchange of stock at par of the new company for the shares of the consolidating companies.* (Page 31 of brief.)

The consolidation agreement itself provides for the issuance of the stock of the new company as share for share for stock of the constituent companies upon the transfer by the Hudson Counties company to the new company of all of the capital stock of the Security Light and Power Company, a Poughkeepsie corporation. It also provides for the conversion of said debenture bonds into stock to the amount of \$450,000.

The consolidation agreement further contains a specific limitation upon future stock issues as follows:

The balance of said capital stock, including any amount not required to take up the convertible debenture bonds above referred to, shall be held unissued by the new company and shall be issued for future requirements of said corporation when and if duly authorized and approved.

If the property of the Poughkeepsie company were such that its stock were worth more than par, the Newburgh company's being worth par, and the Hudson Counties company's worth as much less than par as the Poughkeepsie company's were worth more than par, the Commission might very well conclude that the capital stock of all were equalled by the fair

value of the property of all. But after having used the Poughkeepsie surplus in that manner, that is to say, as an offset to the weakness of the other two companies, may the consolidated company later claim it as the basis of additional capitalization? The question arises whether the words "future requirements" are not fully explained by counsel on page 30 of his brief —

Not only had these companies pressing need of the funds above specified (see list of items at pp. 28, 29, aggregating \$389,097.41), but only a short look into the future shows that there will be additional capital required for additional generating apparatus, for extensions of electric lines to complete the return circuit of the Newburgh company back to Newburgh from its present terminus at Montgomery, and for other work.

The petition in the consolidation proceeding contains a statement (verified by the proper officer of each company) that the surplus of such authorized capital stock would remain unissued, and would be "hereafter issued only if and as the needs of the company may require and upon the approval of this Commission". (Petition, fol. 62.)

We think it clear from the foregoing that it was the evident intention of the parties to the agreement that there should not be any capitalization of the surplus existing at the time of the consolidation, and that stock in future should be issued only for the requirements of the corporation. A capitalization of surplus for the declared purpose of a dividend is not we think within the meaning of the clause so quoted from the consolidation agreement, and it seems plain that the present application for reimbursement by stock capitalization, based upon the combined surplus as it existed when the consolidation was effected, amounts under the circumstances to an attempt to issue stock based upon the contract or agreement for consolidation, or at least to increase the outstanding stock because, and as a direct result of, and indissolubly connected with, the consolidation itself.

The Company's Surplus

It is important, however, to go more fully into the merits of the application as distinguished from any general legal question involved. Was the surplus shown in the balance sheet set forth in the Commission's order in the consolidation case such a surplus as might have been considered as undivided profits and on account of the expenditure of which on the properties the company may properly be reimbursed by the issue and sale of stock under the provisions of section 69 of the Public Service Commissions Law?

The case as presented permits the adoption of either of two views. The report of Mr. H. H. Crowell, an engineer appointed in the consolidated case to make an inventory and appraisal of the properties, is on file. We may take the engineer's report filed in the consolidation case as it stands, or we may analyze it as to various percentages used by him in getting at reproduction cost new, and do so with a view to reaching a fair approximation to actual cost. In either view, two deductions must be made. The engineer's report includes a reproduction cost for the Cornwall Telephone property, the stock of which is owned by this applicant company. This is a mere investment which we have hitherto directed to be carried as such in the company's books. The report also covers paving over mains by the applicant company's predecessor in Newburgh. No such paving appears in the company's accounts, and that item must be excluded here. While proper enough as a reproduction item, it represents no possible expenditure in this accounting case.

No. 1: Based solely on the engineer's report:

Reproduction cost new.....	\$3, 447, 799.06
Deduct property added after Dec. 31, 1910	\$134, 395.29
Deduct Cornwall Telephone Co. property	23, 874.28
Deduct Newburgh paving not done.....	42, 665.00
	<hr/>
	200, 934.57

Fixed capital on basis of engineer's figures as of December

31, 1910	\$3, 246, 864.49
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This is in excess of the Commission's balance sheet figures for fixed capital in the consolidation case above given, \$3,210,887.24, the difference being \$35,977.25. The engineer finds that the property has depreciated to the extent of \$301,245.75. This is as of July 1, 1911. A somewhat less sum must of course be used for the depreciation on December 31, 1910, but what the difference should be is not stated. It can make little difference in the result for this purpose, and therefore the full amount is here used. This sum, since it represents depreciation, must be set up on the liabilities side of the balance sheet: \$301,245.75.

The balance sheet above set forth would be corrected by the figures used by the engineer, as follows:

<i>Assets:</i>	
Fixed capital	\$3,246,864.49
Floating capital	237,370.44
Investments	42,225.98
Miscellaneous temporary debits	43,297.82
<hr/>	
Total	\$3,569,758.73

<i>Liabilities:</i>	
<i>Capitalization:</i>	
Common stock	\$1,100,000.00
<i>Funded debt:</i>	
Mortgage bonds	\$1,400,000.00
Debenture bonds	430,300.00
<hr/>	
	1,830,300.00
<hr/>	
	\$2,930,300.00
Unfunded debt	303,836.58
Reserves	27,701.26
Accrued amortization of capital (depreciation)	301,245.75
Corporate surplus	6,675.14
<hr/>	
Total	\$3,569,758.73

In short, the surplus of \$271,943.64 apparently shown in the revised consolidated balance sheet in the consolidation case, and above set forth, is reduced by the engineer's figures to \$6675.14.

It seems inevitable that, if we take the engineer's figures, no basis remains for further consideration of this application.

This report on reproduction cost covers all things necessary to open the plants for business, and with the lines and mains already connected up with customers' meters installed to the number in use December 31, 1910. It includes also 15 per cent for engineering, superintendence, and administration on all except land, and something over \$30,000 for some general equipment, with interest upon the total at 6 per cent for one year as and for interest during construction, and also on the price fixed for the land, but excepting that amount of general equipment. The unit prices given in the report are for reproduction, and while here received for that purpose they are necessarily higher than would result from close bargains made from time to time as additions are required to plants begun in a much smaller way and developed to meet business demands; and under such conditions the percentages above stated would be very largely reduced. The engineer so appointed (Mr. H. H. Crowell) has plainly endeavored to prepare a fair and acceptable appraisal on a reproduction basis, for which he deserves commendation. Depreciation, however, is essentially a liability, and as such it must appear in a balance sheet upon the liabilities side. The figures given above as based on the engineer's report include the intangible as well as the tangible capital.

No. 2: Based on engineer's report and appropriate estimates to approximate actual cost:

We should make a closer analysis of the engineer's figures, and with a view to bringing the accounts of the company nearer to the basis of actual cost and as showing the accrued depreciation.

The condensed balance sheet as fixed by the Commission for the consolidated company as of December 31, 1910, was as follows:

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Fixed capital	\$3,210,887.24
Floating capital	237,370.44
Investments	42,225.98
Miscellaneous temporary debits.....	43,297.82

Total \$3,533,781.48

Capitalization:

Common stock

Common stock \$1,100,000.00

Funded debt:

Mortgage bonds \$1,400,000.00

Debenture bonds 430,300.00

1,830,300.00

..... \$2,930,300.00

Unfunded debt 303,836.58

Reserves 27,701.26

Corporate surplus 271,943.64

Total \$3,533,781.48

Following the balance sheet statement, the Commission stated in its opinion as follows:

Subject to such adjustments as would be required by current corporate transactions after December 31, 1910, the balance sheet given above in detail should constitute substantially the basis of opening entries on the books of the new or consolidated company.

It was plain to the Commission, however, that while its examination of the accounts had been thorough and accurate, its engineer had not been able to make a distribution of fixed capital into the proper accounts, and as a condition of approval of the consolidation it was required that a detailed inventory and appraisal should be made by a competent engineer, to be used in determining such distribution, and the general basis of such inventory and appraisal was stated. It was also required in the order of the Commission that before such inventory and appraisal should be undertaken the said engineer employed in such work should present to the Commission through the consolidated company a detailed plan of the work, including the methods intended to be employed and the principles of valuation proposed to be

followed, and the said methods and principles should be settled and approved by the Commission before the work of inventory and appraisal should proceed. The engineer employed by the company to do the work was an engineer who had been in the employ of the Commission for a number of years, and it was not considered upon his undertaking the work that this particular provision of the order should be carried out. The order further required that upon the completion of the said inventory and appraisal the same should be submitted to the Commission for its approval, and in case the same should not be approved as a whole by the Commission such hearing should be had and order entered by the Commission in respect of such inventory and appraisal as might appear necessary; and it was still further provided that the Commission should thereupon give appropriate direction for correction of the book entries provided for in subdivision (f) of the order, which was the subdivision containing the balance sheet. The inventory and appraisal prepared by the engineer has been submitted to the Commission. Certain extensions of the appraisal are to be made before the definite direction for correction of the book entries as provided for in the said consolidation order can be given, but for the purpose of this case the report as it stands may be appropriately used. While no formal hearing has been had upon this report, several conferences have been held with officers of the company and the engineer, and no reason appears why the Commission may not now undertake the analysis of that report for the purposes of this case. The company is desirous also that the Commission shall proceed with the report as presented.

The inventory and appraisal report of the engineer, dated July 1, 1911, shows a total for reproduction of the properties new, without depreciation, of..... \$3,447,799.06

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This report includes in the reproduction estimate items of 15 per cent on other than land and general equipment, for engineering, superintendence, and administration...			\$400,592.92	
and 6 per cent for one year upon the reproduction estimate, including land but excluding general equipment, plus the engineering, superintendence, and administration as and for interest during construction			193,463.99	594,056.91
Reproduction estimate of engineer, excluding items above mentioned.....				\$2,853,742.15
This reproduction appraisal is of July 1, 1911, and it appears that there was added property after December 31, 1910, amounting to				110,250.44
Reproduction new, excluding items above mentioned and as of December 31, 1910..				\$2,743,491.71
This, however, includes items of re-paving over mains in Poughkeepsie and Newburgh. It can not be ascertained to what extent mains were laid before paving at Poughkeepsie, but in Newburgh it is ascertained that pavement in that city was put down after mains were laid and that an item of \$35,000 therefor should be excluded			\$35,000.00	

It also includes the Cornwall Telephone system. This is an investment item, not a part of fixed capital used in the company's operations, and should be excluded here.

19,585.15	54,585.15
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Balance for reproduction cost as assigned by

engineer for December 31, 1910..... \$2,688,906.56

It is to be remembered that the sole effort in this appraisal for consolidation case is to arrive at an approximation of the actual first cost of the property formerly owned by the constituent companies. A very large part of the property additions has been made during operation of the plants, and it is known that a great portion of engineering and superintendence expenses which would be incurred in actual reproduction of the properties as a new undertaking has been covered by operating expenses in the salaries of persons regularly employed. Much the greater part of additions to the company's fixed capital has been installed under company operation calling for no special engineering skill or not provided for in the general conduct of the business. A great many of the items covered by the fixed capital account do not call for engineering skill at all, nor for any special superintendence such as consulting engineers supply.

The engineering and superintendence percentage is not applied by the engineer to

land or general equipment, which total... \$183,723.70

deducted from the net item for reproduction

above stated 2,688,906.56

leaves \$2,505,182.86

Applying 15 per cent for engineering, superintendence, and administration to this

sum gives \$375,777.43

We are convinced that this amount for engineering, superintendence, and administration is much too high and far in excess of what ordinarily would be chargeable in the fixed capital account for additions to the property during current operation. It is impossible, on the other hand, to determine with any accuracy what sum should be allowed as legitimate for this purpose. We are satisfied, however, that it should be reduced fully or nearly one-half, and under the knowledge we have of actual engineering cost to which the company has been subjected in the past few years, it appears that an ample allowance for this purpose would be..... \$200,000.00
This brings the valuation for fixed capital

account purposes up to	\$2,705,182.86
Exclusive of land and general equipment....	183,723.70

The land and general equipment added makes
the total \$2,888,906.56

Interest on construction at 6 per cent should average at not more than six months instead of one year as assumed in the engineer's report, for here again the greater part of the work has been done during current operation with a minimum period of actual interest expenditure in every case. The engineer has not figured interest on general equipment scheduled at \$30,523.70. Deducting that gives the sum on which interest is figured. The engineer's interest item on this sum, \$2,858,382.86, is \$171,502.97. The amount allowed is..... 85,751.48

and this is probably large as we are convinced that it is in excess of actual capital expenditure on that account.

Total tangible property	\$2,974,658.04
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The Company's Proper Fixed Capital Account

We find the foregoing as the proper sum for the tangible property of this company as of December 31, 1910. We found in the consolidation case that \$3,210,887.24 represented our fair judgment of the total fixed capital, and we now find that the difference between that

amount	\$3,210,887.24
and the foregoing	2,974,658.04

namely \$236,229.20
represents fairly the amount of "Other Intangible Capital" which should be set up on the company's books as of December 31, 1910. In so finding we are mindful of the fact that the appraisal of the engineer includes some property at Cornwall which is not in actual service and has not been for a considerable period, and of the further fact that the unit prices necessarily used by the engineer can not refer back to the date of installation or purchase in every instance. Under all the circumstances, it now appears that the original allowance made for the total fixed capital \$3,210,887.24, resulting in the above amount for the separable intangible element, was liberal.

This brings the accounts as of December 31, 1910, to the condition they were in at the time the opinion was rendered in the consolidation case and in accordance with the ruling there made. Apparently, from such accounts the companies as of that date had a combined surplus of \$271,943.64, but the fixed capital accounts represent the assumed cost of the property. From this the engineer finds a depreciation amounting to \$301,245.75. If we accept his unit prices for the cost new of the properties, we must take also his depreciation statement. This put in the liabilities column more than offsets the stated surplus and nearly equals the stated surplus of October 1, 1911, namely \$308,150.43.

The engineer's report was made as of July 1, 1911, and the depreciation stated above is as of that date. The company's

books should be opened in accordance with the revised consolidated balance sheet as of December 31, 1910, as set forth in the Commission's opinion. If the accounts have already been opened and are not in harmony with such balance sheet, they should be revised accordingly. The total fixed capital shown in such balance sheet of \$3,210,887.24 should be divided into fixed capital sub-accounts so as to show

Other intangible capital	\$236,229.20
Interest during construction	85,751.48
Engineering and superintendence.....	200,000.00

The remainder of the total fixed capital, \$2,688,906.56, representing tangible fixed capital, should be subdivided into the appropriate accounts in accordance with the detailed inventory and appraisal of the engineer, subject to corrections as heretofore indicated in this opinion. On the liabilities side an account "Accrued amortization of capital" should be raised of \$301,245.75, or such lesser sum as is indicated by deduction of estimated depreciation for the six months between December 31, 1910, and July 1, 1911. The accounts as of July 1, 1911, should show the full amount of such depreciation in the Accrued amortization of capital account. This account should be created by debiting corporate surplus or current income — operating expenses — as may be necessary.

The additions to fixed capital from December 31, 1910, to July 1, 1911, should not be entered on the company's books in accordance with the prices set forth in the engineer's report which was intended to apply to property as of December 31, 1910. They should be placed in the company's books in exact accordance with cost as per vouchers filed.

Fixed Conclusion

It is plain from the analysis here made that the Central Hudson Gas and Electric Company is not entitled under proper use of the engineer's report as applied to its accounts to any reimbursement on account of moneys expended from

income for additions and betterments. The present application on all considerations must be denied. When the engineer's report has been finally completed by extending the item prices, and the final order of the Commission in the consolidation case respecting the accounts and distribution of fixed capital has been entered, the resulting surplus will be definitely shown upon the books.

In the Matter of the Complaint of RESIDENTS OF SYRACUSE
against SYRACUSE, LAKE SHORE AND NORTHERN RAIL-
ROAD COMPANY as to increased rates of fare between
Syracuse and Long Branch.

1. A rule that fares should be computed on the distance and service through, instead of taking arbitrarily a fare within a city and adding it to the fare outside, applies generally and should be observed.

2. Respondent required to sell its 20 cent round-trip tickets, good between May 1st and September 30th, between its Syracuse terminal and Long Branch or Stop 11, for use during thirty days instead of the one-day limit now in force.

3. Respondent's single-trip cash fare of 15 cents between Stop 1 (within Syracuse) and Long Branch or Stop 11, distance 5.6 miles, held unreasonable and ordered not to exceed 10 cents.

Submitted March 27, 1912. Decided July 23, 1912.

C. W. Dunn for complainants.

Nottingham & Nottingham (by William Nottingham)
and *H. C. Beatty* for respondent.

DECKER, *Commissioner*:

Long Branch, known as Stop 11, on respondent's line, is a summer resort on Onondaga lake. It has the usual amusement park and other attractions offered by a suburban pleasure enterprise reached by electric railway, and besides it has a summer resident colony occupying about thirty cottages. This complaint, signed by 74 residents of Syracuse, challenges respondent's increased fares to Long Branch or Stop 11 from Stop 1, which is in Syracuse, and from respondent's terminal at the common center in Syracuse. These increased fares were made effective October 6, 1911. Prior to that date and for some years respondent had in force a round-trip fare of 20 cents, without time limit fixed by tariff, between the common center in Syracuse and Stop

11. The one-way cash fare was 15 cents, but the one-way ticket rate was 10 cents. The present rates are: One-way cash or ticket fare 15 cents; round-trip ticket, sold from May 1st to September 30th, and good for only one day, 20 cents; round-trip ticket, good for 30 days and sold all the year, 25 cents. Prior to October 6, 1911, respondent had in effect between Stop 1 (in Syracuse) a round-trip ticket, sold without limitation, at 10 cents; a one-way ticket sold at 5 cents; and a cash fare one way of 10 cents. The only rate now in effect, under tariff authority, is a one-way cash fare of 15 cents. The distances between the points mentioned are: Common center, Syracuse, to Stop 11 or Long Branch, 7.3 miles; and from Stop 1 in Syracuse to Stop 11 or Long Branch, 5.6 miles. The following table shows the rates per mile under the former and the present rates between Syracuse common center and Stop 11:

	<i>Previous to Oct. 6, 1911</i>	<i>Per mile</i>	<i>Since Oct. 6, 1911</i>	<i>Per mile</i>
Round-trip, general or 30 days	20¢	1.369¢	25¢	1.712¢
Round-trip, one day limit, May 1–September 30....			20¢	1.369¢
Single-trip ticket	10¢	1.369¢	15¢	2.054¢
Single-trip cash	15¢	2.054¢	15¢	2.054¢

The real complaint here is against the increase in the general round-trip fare from 20 to 25 cents, and the limiting of the 20 cent round-trip fare to the summer season and to one day for use. The travel is very light in other than the season May 1st to September 30th. The ticket sales for October to January inclusive, four months, in 1911 and 1912, between Syracuse and Stop 11, were 235 tickets, 113 of which were single-trip and 122 were round-trip. There is no ticket office at Stop 11. Persons living at Long Branch during the summer season can avail themselves of respondent's 50 trip commutation tickets, good for 30 days, and sold at \$3.75, equal to 7.5 cents per ride or 15 cents for the round-trip. The other coupon books of respondent would not be

attractive to Long Branch passengers. The fact that respondent has in effect during the summer season a 20 cent round-trip fare implies that it should be offered on terms under which it can be freely used. Temporary residents at Long Branch in Summer may not be able freely to use the commutation ticket, that is, they may not desire to ride nearly as many as fifty times during the month. Their stay at Long Branch may be less than a month, or they may desire to ride but two or three times per week. We see no reason for disturbing the round-trip fare of 25 cents applicable from October 1st to April 30th inclusive, but respondent's summer season round-trip ticket sold for 20 cents should be made good for 30 days instead of the one day limit now imposed.

The following table shows the rates per mile under the former and the present rates between Stop 1 (in Syracuse) and Stop 11:

	<i>Previous to Oct. 6, 1911</i>	<i>Per mile</i>	<i>Since Oct. 6, 1911</i>	<i>Per mile</i>
Round-trip without limitation	10¢	0.892¢	.....	.....
Single-trip ticket	5¢	0.892¢	.....	.....
Single-trip cash	10¢	1.785¢	15¢	2.678¢

The fares stated as in effect prior to October 6, 1911, are as set forth in the company's tariff. Nevertheless, respondent has no ticket office at Stop 1 or Stop 11. To have used the ticket fares then in force, apparently a passenger must have had to go to the common center ticket office. The tariff now in force does not show any fare from Stop 1 other than the cash fare of 15 cents, though it may be that the company accepts tickets purchased at the common center terminal. The round-trip tickets from the common center are practically useless to the passenger riding from Stop 1. The round-trip ticket fare of 25 cents, moreover, is grossly excessive, 2.232 cents per mile, and the single-trip cash fare of 15 cents, 2.678 cents per mile, is also unreasonable. Under the circumstances, respondent should put in force a

flat cash fare of 10 cents for a single trip between Stop 1 and Stop 11.

The rule that the fares should be computed on the distance and service through, instead of taking arbitrarily a fare of 5 cents within the city and adding it to the fare outside, applies generally and should be observed.

Order will be entered accordingly.

IN the Matter of the Complaint of H. FREEMAN JOHNSON
AND OTHERS *against* SYRACUSE, LAKE SHORE AND NOR-
- THERN RAILROAD COMPANY.

Respondent's single-trip cash fare of 10 cents between Stop 28 on its line and the city of Fulton, applying over an extreme distance of 3.39 miles and constituting nearly 3 cents (2.949 cents) per mile, held unreasonable and ordered not to exceed 5 cents.

Submitted June 28, 1912. Decided July 23, 1912.

George M. Fanning for complainants.

H. C. Beatty for respondent.

DECKER, *Commissioner*:

It is complained that respondent's one-way fare of 10 cents between Stop 28 and the city of Fulton is excessive and unreasonable.

The extreme distance from the northerly line of the city of Fulton to Stop 28 is 3.39 miles. The 10 cent fare gives respondent over this extreme distance nearly 3 cents (2.949 cents) per mile. On a basis of 2 cents per mile, which respondent aims to secure by its cash fares, its fare over that distance would figure 6.78 cents. It is its custom to charge 5 cents or a multiple of 5 cents, according to that which is nearest the product of 2 cents per mile. It would do so in this case except that its 2 cent per mile rule applies only outside of cities. It takes a 5 cent fare in the city and adds thereto its 2 cents a mile and a minimum of 5 cents. This disregards the proper rule that since the carrier undertakes and performs a through service its fare should be upon the distance through and not be an arbitrary combination of the fares inside and outside of the city.

Previous to October 6, 1911, the fare between Fulton and Stop 28 was 5 cents. In July of that year respondent extended its line from the center of Fulton to Oswego. The

distance from the end of the line in the center of Fulton to Stop 28 was about 2.6 miles. It was because of the extension that respondent made its fare between Stop 28 and any part of Fulton 10 cents. Respondent has a round-trip ticket fare of 15 cents between Stop 28 and Fulton, but these tickets must be purchased in Fulton at the business center. They can not be bought on the cars, and their use is thereby much restricted. Respondent also has in force a 5 cent fare from Stops 26, 27, and 28 to Fourth street, near the south city line of Fulton.

It does not follow that the entire distance to the city line must be taken as the distance in every case upon which to figure the proper fare, since the great bulk of travel may be over a much less distance, and part of the city beyond may be unimproved by residences or other buildings. In this case it appears that there are very few buildings in Fulton beyond 3.18 miles from Stop 28. The bulk of the travel is over a somewhat less distance, and probably to and from the business center, a distance of 2.6 miles.

Complainants are interested in a baseball park, dancing pavilion, and boat livery near Stop 28. Much was said in testimony concerning the extent of the patronage, and reference was made to the use of the baseball park on Sunday. The real question here is whether this fare of 10 cents is reasonable, and we shall confine ourselves in this case to respondent's own ruling basis. Stop 28 is entitled to reasonable fares regardless of the fact that it is now included in the fare zone which embraces Stops 27 and 26, the latter being about $2\frac{1}{2}$ miles from the city line. Respondent's average cash fare over its entire line is figured by its traffic manager at 1.953 cents per mile. The determining fact here is that the 10 cent fare for a distance of 3.39 miles is practically 3 cents per mile. This is too high. We express no opinion upon the reasonableness of 2 cents per mile as a rule for computing fares. Using it in this case, however, at 2 cents per mile, 6.78 cents results, and this being nearer 5

cents than 10 cents, it is indicated that the 5 cent fare between Stop 28 and Fulton should be restored. While this gives 1.475 cents per mile, a mileage rate below respondent's average cash fare, it results because the fares are 5 cents or multiples of 5 cents, and using respondent's own general mileage rate upon the distance through gives a product which is nearer to 5 cents than it is to 10 cents. If the distance were 3.76 miles, 7.52 cents would result, and on the same basis a 10 cent rate would be indicated, but in that case a mileage rate of 2.66 cents would be given. It is these variations which create for respondent an average cash rate of 1.953 cents, or practically 2 cents per mile. Moreover, much the greater part of this extremely light aggregate traffic between Fulton and Stop 28 must be over considerably less than 3.39 miles; probably somewhat less than 3 miles.

Order requiring a 5 cent fare between Stop 28 and Fulton will be entered.

In the Matter of the Complaint of CHARLES E. WHITEHOUSE
against THE NEW YORK AND LONG ISLAND TRACTION
COMPANY.

Respondent's predecessor in name applied to the highway commissioners of the Town of Hempstead, Nassau county, for a franchise, and on June 6, 1901, the franchise was granted describing a route within the town outside of incorporated villages. This route included a part on Washington street or road lying north of the incorporated village of Hempstead and running to the northerly line. The predecessor company as incorporated in 1899 fixed its route on Franklin street instead of Washington street, but subsequently, in the same year, changed its route to Washington street. Nevertheless, while the application for the town franchise was pending, the company on May 15, 1901, changed its route back to Franklin street. On May 3, 1901, before so changing its route back to Franklin street, it applied for a franchise on Franklin street, a county road, to the board of supervisors, which board on June 7, 1901, authorized the execution of the franchise; and on July 6, 1901, it was executed. The company accepted both franchises and built its line under both franchises. The town franchise of June 6, 1901, imposed a condition that the fare to be charged by the company should not exceed 5 cents for any five miles or less. *Held*, that the company's attitude was entirely deceptive toward the town board of highway commissioners, and that by applying for the two franchises contemporaneously and accepting and constructing its line under both it was and is bound by the fare condition in the town franchise on Franklin street as part of its line; and that this was not altered by an extra-official consent referring in no wise to the town franchise of June 6, 1901, or any condition contained therein, and given later by the town board of highway commissioners to the building on Franklin street, a county road, over which the town board of highway commissioners had no jurisdiction, which lack of jurisdiction is stated by the town board in the consent so given.

Respondent ordered to charge not to exceed 5 cents for the less than five miles distance between Stop 72, in the village of Roosevelt, and a point in Garden City at the highway crossing of the Long Island Railroad near the plant of Doubleday, Page & Company.

Submitted December 15, 1911. Decided July 31, 1912.

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Charles E. Whitehouse, complainant, in person, and by
George M. Levy, attorney.

Arthur G. Peacock for respondent.

DECKER, *Commissioner*:

This case involves construction of respondent's franchise authority as applied to its fare from Roosevelt, at Pleasant street (Railroad Stop 72), to Garden City (Long Island railroad crossing), a distance somewhat less than five miles. The crossing in question is near the plant of Doubleday, Page & Company in Garden City. Respondent charges 10 cents for transporting a passenger between these points. Complainant contends that respondent is restricted by a condition in its franchise to a fare of 5 cents for that distance, five miles or less. The case as heard presents solely the question of law.

In the case of *Edwards v. N. Y. & L. I. T. Co.*, 1 P. S. C., 2d D., 127, we held that the franchise granted by the highway commissioners of the Town of Hempstead to respondent's predecessor in name, Mineola, Hempstead and Freeport Traction Company, restricting the fare to 5 cents for any five miles or less, applied to fares between Freeport and Hempstead villages. The same franchise is before us in this case.

It appears however that this franchise of June 6, 1901, refers to the construction of a railway from the north line of the town of Hempstead on and along Washington street to the village of Hempstead north line, and that the railway was never so constructed, but was built on and along Franklin street from said north line of the town of Hempstead to the north line of the village of Hempstead. This was done under authority of a franchise granted by the board of supervisors of the County of Nassau, Franklin street being a county road not under the immediate jurisdiction of the highway commissioners of the Town of Hempstead. The fare restriction to 5 cents for any five miles or less in the town franchise

applies to the entire line "as herein described". The language is as follows:

And it further agrees that the maximum fare for one continuous passage in either direction over the entire line as herein described, shall not exceed 10 cents, and shall not exceed 5 cents for any five miles or less.

The route described is as follows:

Beginning at a point on Washington street where the said street enters the town of Hempstead, running thence southerly on and along said Washington street to the point or place on said Washington street where it enters the village of Hempstead.

Also from the point or place on Henry street where it leaves the village of Hempstead, running thence southerly on said Henry street to Greenwich street, thence southerly on and along said Greenwich street, on the easterly side thereof, through the hamlet of Greenwich Point, to the point or place on said Greenwich street where it enters the village of Freeport.

Also from a point or place at the southerly end of Grove street at the village line to and along a road unnamed, running southerly from the Woodcleft Inn to the open water.

The second paragraph of the franchise provides that before the company "shall begin to build said street surface railroad upon the *above described streets and roads*" it shall give two bonds, each of \$6000, to the Board of Highway Commissioners of the Town of Hempstead to indemnify the Town: one bond against damages, claims, or expenses by reason of any act done by the company in building the line, and the other to cover damages to the streets and roads described in the franchise; and paragraph four provides that the said road shall be built within twelve months.

The application to the highway commissioners of the Town of Hempstead was presented some time before it was granted on June 6, 1901, probably in April or May. The company's route, originally fixed on Franklin street by its certificate of incorporation filed on February 27, 1899, was changed November 10, 1899, to Washington street. But on or about May 15, 1901, and while its application to the town board was doubtless pending and undecided by the board, it

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changed its route back to Franklin street. On May 3, 1901, before its route was changed back to Franklin street, it applied to the board of supervisors for a franchise authorizing it to build on Franklin street. On June 7, 1901, one day after the town franchise was granted, the board of supervisors authorized the execution of the Franklin Street franchise, and on or about July 6, 1901, that franchise from the board of supervisors was executed and filed. The Mineola, Hempstead and Freeport Traction Company thus was applying before the two boards for different routes at the same time, and its application before one of these boards was for a route which in part it had not then adopted and could not use. Assuming that on May 3, 1901, when the company applied to the supervisors, it knew that its route would be changed back to Franklin street on May 15th, then it also knew that it was applying for and urging the granting of a franchise by the highway commissioners allowing it to build on Washington street where it had already determined not to build, and this in connection with the remainder of the route through the town; and it accepted the highway commissioners' franchise with the conditions therein stated, knowing well at the time that some of these conditions, including this fare restriction, would not literally apply to a part of the line described in the franchise because as to that part it had already changed its authorized route to another location. It accepted both franchises and proceeded to build under both, the one on Franklin street north of the village of Hempstead and the one on a route south of that village which is described in the town franchise. It accepted the franchise from the Town, though at the time of acceptance it had no intention of using it in its entirety, and it used the supervisors' franchise to build on Franklin street instead of Washington street. It is a proper assumption that the town highway commissioners were led to believe that the road was to be built on Washington street, and that its requirement for the building of the line within twelve

months, and the provision for a fare restriction to 5 cents for any five miles or less, were made with a view to the actual building of the entire line as the franchise described. This view finds further strong support in the fact that the line as described in the franchise does not cover a total distance of five miles if the part above Hempstead village is omitted; and leaving out the incorporated villages of Hempstead and Freeport, a continuous ride of five miles as contemplated in the franchise could not be had. The application contemporaneously made and urged upon the board of supervisors for a different route north of Hempstead village shows utter absence of good faith on the part of the company with the town authorities. By these contemporaneous applications for the right to build north of the Hempstead village line over two different routes, with the predesigned use of one franchise for part of its route, though such franchise covered all of a stated route, and the use of the other for the remainder of its route, the company's attitude toward the highway commissioners was entirely deceptive and intended to avoid the application of the fare restriction north of Hempstead imposed by the highway commissioners in good faith for the entire line and in expectation of its observance. The substitution of Franklin street for Washington street was one of which the company ought to have apprised the highway commissioners before accepting their franchise, and it was in duty bound to notify such commissioners before the franchise was accepted in order that the commissioners might make such change in the franchise conditions as they should deem required. The substitution as part of its lawful route of Franklin street for Washington street while the franchise for Washington street was pending, and the later acceptance of the Washington Street franchise from the highway commissioners, left, in our judgment, the condition as to fare expressed in the highway commissioners' franchise in full effect over the entire route, and with the same force as if the road were constructed and operated upon Washington street.

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Any other view would lay strong grounds for attacking the validity of the town franchise in its entirety. Good faith is a prerequisite in the matter of these public grants. When this company sought the town franchise with the route continuing through the town and via Washington street, knowing before the application was granted that it did not intend to build on Washington street and could not so do, having changed its route to Franklin street in the manner required by law, its acceptance of the town franchise bound it, we hold, to observe the conditions of the grant over the entire route including the substituted short distance on Franklin street. Its only recourse was to relinquish that franchise in its entirety or secure an amendment in terms relating thereto by action of the highway commissioners.

After the board of supervisors' franchise of July 6, 1901, was executed, the company obtained from the highway commissioners of the Town of Hempstead on July 15, 1901, a resolution confirming the board of supervisors' franchise. The highway commissioners had no jurisdiction over this county road on Franklin street, and they could add no authority to that which was given by the supervisors. The resolution of the town highway commissioners very carefully so states. The resolution reads:

Whereas, The exclusive control of said portion of Franklin street above described is vested in the Board of Supervisors of the County of Nassau, New York; and

Whereas, Said application is made to this board to comply with the provisions of section 91 of the Railroad Law, which required the consent of the local authorities to the building and maintaining of a trolley railroad upon a street or highway, and which also defines such local authorities in a town to be the board of highway commissioners; and

Whereas, Said Mineola, Hempstead and Freeport Traction Company has heretofore made application to the board of supervisors of Nassau county, N. Y., for its consent to building, maintaining, and operating by said company of a trolley railroad in, upon, and along said portion of Franklin street above described; and

Whereas, By resolution duly adopted by the said board of supervisors at a regular meeting held on the 7th day of June, 1901, it was

determined that consent asked for by said company in said application be granted under certain conditions and restrictions; now therefore be it

Resolved, That the Mineola, Hempstead and Freeport Traction Company be and the same hereby is granted the consent of the Board of Highway Commissioners of the Town of Hempstead, Nassau county, so far as said board of highway commissioners now have or hereafter may acquire authority over said street, to build, maintain, and operate for the term of ninety-nine years a street surface railroad operated by electricity or any other power other than locomotive steam power, over, on, and along the following streets, together with the necessary switches, sidings, turnouts, poles, and wires, under and in accordance with the laws of the State of New York,

There is nothing in this general consent given by the highway commissioners to the building on Franklin street, over which it disclaimed jurisdiction and actually had no jurisdiction, which in terms modifies or amends the town franchise of June 6, 1901. The consent was plainly obtained by the company with reference to section 91 of the Railroad Law, though unnecessary because the legislature had deprived the highway commissioners of jurisdiction by enacting the county road law for that section of the State. Such mere extra-official action by the highway commissioners shows no intent to modify the fare condition in the town franchise, and is not to be construed to relieve the company from the covenant entered into by it with the town authorities, and render practically nugatory the whole application of the fare restriction to 5 cents for five miles or less as expressed in the franchise of June 6, 1901. The highway commissioners of the towns in this State as a rule are not lawyers nor are they skilled in the law, and while in the main keen to protect the public interest in the issuance of grants of authority to railway and other utilities of a public nature, it is not to be expected that they shall know and be able to guard fully against all of the possible consequences of granting supplementary consents for special purposes wholly dissociated in their presentation by the company from the original grant or the conditions in such grant expressed. Upon this and

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other considerations the courts have refused to nullify franchise covenants where doubt is raised by ambiguity of language or where it is contended that subsequent separate grants, or acts having only incidental relation to the original, operate by implication to relieve the grantee from the performance of its obligations. The franchise of June 6, 1901, granted by the board of highway commissioners has not been amended or modified in terms or by necessary implication, and we hold that it is in force as to this fare restriction to 5 cents for any five miles or less over respondent's line as involved in this case.

Order will enter directing the company to cease from charging more than 5 cents for carrying a passenger between Stop 72 in Roosevelt and the highway crossing of the Long Island railroad near the plant of Doubleday, Page & Company in Garden City.

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EDWIN G. WRIGHT *against* THE NEW YORK AND LONG ISLAND TRACTION COMPANY, and CLARENCE R. ANKERS *against* THE NEW YORK AND LONG ISLAND TRACTION COMPANY.

The words "and shall not exceed five (5) cents for any five miles or less" appearing at the end of paragraph 7 of conditions in a franchise granted February 3, 1903, by the highway commissioners of the Town of Hempstead, county of Nassau, to respondent, is a condition which appears in conjunction with and refers to the proportion or share which the respondent may accept as a joint rate, and does not refer to respondent's local fares some of which are restricted in the first part of said paragraph.

Submitted July 24, 1912. Decided July 31, 1912.

Edwin G. Wright in person.

Elvin N. Edwards for Clarence R. Ankers.

A. G. Peacock for respondent.

DECKER, *Commissioner*:

Respondent charges a fare of 10 cents per passenger between Rockville Center and Valley Stream, and between Rockville Center and the New York City line at or near Rosedale. The distance from Rockville Center, east line at Driscoll avenue, to Valley Stream at the west village line is 3.678 miles. The distance from Rockville Center, east line, to the New York City line is apparently about or something over five miles, and from the west line it is less than five miles.

Complainant Wright claims that the distance between Rockville Center and the New York City line is under five miles, and that respondent is not entitled under its franchise to charge more than 5 cents for five miles or less. He asserts that respondent's fare of 10 cents between Rockville Center and Valley Stream, and between Rockville Center and the city line, is prohibited.

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Complainant Ankers confines his complaint to the fare between Rockville Center and Valley Stream, and makes the like claim that the franchise does not permit a fare of more than 5 cents.

The question of the reasonableness of the fare is not before the Commission.

The sole matter for determination is whether under a franchise granted by the commissioners of highways of the Town of Hempstead February 3, 1903, the respondent is prohibited from charging more than 5 cents for a single ride on its line for a distance of five miles or less, and the question turns upon the proper construction of paragraph 7 of the conditions set forth in that franchise.

This franchise authorized the respondent to use described highways between the westerly line of Freeport and the westerly limits of the town of Hempstead at the New York City line, the description there given omitting that portion of respondent's line within the incorporated village of Rockville Center, for which the board of trustees granted a franchise which is also in evidence. The Rockville Center franchise limits the fare from Rockville Center to the city line to 10 cents.

The distance from the westerly line of Freeport to the New York City line is about eight miles.

Paragraph 7 of the franchise conditions in said franchise of the Town of Hempstead of February 3, 1903, relates to rates of fare and reads as follows:

Seventh: Said The New York and Long Island Traction Company agrees to make not less than six round trips daily over the entire line laid by it from the Freeport Village line to the New York City line; and it further agrees that the maximum rate for one continuous passage in either direction over the entire route as herein described shall not exceed fifteen (15) cents, and shall not exceed five (5) cents for one continuous passage between Rockville Center and Freeport, and that said The New York and Long Island Traction Company will issue to and also receive from any connecting line or lines now or hereafter to be built upon payment of one fare therefor, said fare to be agreed

upon by said railways, transfer checks or tickets, the fare to be divided between the connecting companies in proportion to the distance traveled by the passenger, and in no case shall the proportion charged by The New York and Long Island Traction Company exceed fifteen (15) cents for the passage over its entire route from New York City line to Freeport Village line, herein described, *and shall not exceed five (5) cents for any five miles or less.*

The words italicized by us at the end of the paragraph quoted are those relied upon by complainants to compel a maximum fare of 5 cents for any five miles or less. Complainants' contention is that these words at the end of the paragraph refer back to the single fare maximum in the first part of the paragraph. Reading this paragraph without reference to any other consideration would fix the words in connection with the immediate context relating to the proportion which the company may exact under a joint fare with a connecting line.

On the other hand, the franchise covers a distance of only eight miles from the west line of Freeport to the west boundary of the Town of Hempstead at the city line, and the company is expressly permitted to charge not to exceed 15 cents as its share of a joint fare extending beyond the city line and over the line of this and another company. It must be confessed that it is difficult to understand why the granting authority should limit the company for its share of a joint rate to 5 cents from a point five miles east of the city line while permitting the company to take 15 cents for its share of a joint rate when it carries the passenger a distance of eight miles. It is to be presumed that the highway commissioners knew, approximately at least, the distance covered by the franchise over ground wholly within their own town. Complainants' contention, however, that the limiting words in question refer back to the first part of the paragraph which prescribes a maximum local fare is open to precisely the same objection. The maximum fare for local service of the entire route described is also 15 cents, and the extreme distance covered by the route described is about eight miles. Apply-

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ing the limiting words "and shall not exceed five (5) cents for any five miles or less" would prevent the company from charging for five miles or less on either end of its line more than 5 cents, while for eight miles it could charge 15 cents. We also find an assumption in the original answer of respondent in the Wright case that these words do restrict it to a 5 cent fare for any five miles or less, and while this is omitted in the amended answer no averment whatsoever is made in the amended answer on file respecting the words in question. Only now, upon the hearing, does respondent claim that the words do not restrict its local fares.

These same commissioners of highways granted the franchise for respondent's predecessor on June 6, 1901, about a year and a-half previous, for the road to the north line of the town of Hempstead, omitting the parts through the incorporated villages of Hempstead and Freeport. In that franchise the words in question appear twice in the same paragraph, first immediately after prescription of a maximum fare of 10 cents, and again after like prescription of a maximum share of 10 cents in the joint rate. In that case the intention of the highway commissioners to restrict the local fare to 10 cents, but not to exceed 5 cents for any five miles or less, was clear. In that case the intention of such commissioners to restrict the company's share of any joint rate to 10 cents, but in no case more than 5 cents for any five miles or less, was also evident. In this case the restriction to 5 cents for any five miles or less appears only once in the franchise under consideration, and it immediately follows the restriction of the company's share of a joint fare to 15 cents.

It is true that where there is ambiguity in the wording of a franchise the language should be construed against the grantee, and we so held in *Edwards v. N. Y. & L. I. T. Co.*, 1 P. S. C., 2d D., 127, but we find no ambiguity here except upon the assumption, as contended for by complainants, that the words in question at the end of the paragraph refer back to the local fares in the first part of the paragraph.

The first part of the paragraph requires not less than six round trips to be made daily over the entire line between the Freeport and New York City lines. The paragraph then goes on to fix a maximum fare for a continuous passage in either direction "over the entire route as herein described" of 15 cents; and it then adds, "and shall not exceed five (5) cents for one continuous passage between Rockville Center and Freeport". It does not seem possible that the highway commissioners, after taking care to fix a maximum local fare for the entire line, and a special fare for passage between Rockville Center and Freeport, would, if they intended to add a further restriction to 5 cents for five miles or less, refrain from inserting that restriction immediately after the special Rockville Center-Freeport fare, and instead place that restriction at the very end of the long paragraph, and in such connection as to lead the intelligent reader to believe that the restriction to 5 cents applies to the context just preceding, namely the proportion or share of any joint rate. To adopt that view is to impute to the highway commissioners utter ignorance of the usual meaning given to words as they appear in conjunction with other words, and to say that in this one paragraph the highway commissioners used an involved and wholly exceptional method of stating their intention which appears in no other part of the rather long document. Now the last part of this paragraph 7 reads "and in no case shall the proportion charged by The New York and Long Island Traction Company exceed fifteen (15) cents for passage over its entire route from New York City line to Freeport Village line, herein described, *and shall not exceed five (5) cents for any five miles or less*". If the highway commissioners had intended these italicized words (italicized here and not italicized in the franchise) to apply to something besides the proportion of a joint rate, they would naturally have set them up with other words in a separate sentence. A claim that these words, fitting in well to the context where used, also apply to a distinctly separate mat-

ter hardly appeals to the imagination, much less to a proper idea of the application of rules governing the construction of statutes or written instruments.

As the paragraph stands, respondent may charge up to 15 cents for the ride from the Freeport line to the New York City line; 5 cents between Rockville Center and Freeport; and subject to the mileage proportion provision, 15 cents for a joint fare proportion as its service extends over the whole line up to the city line, and 5 cents for its joint fare proportion as its service extends over the line a distance of five miles or less, however disproportionate that may be as compared with 15 cents for the joint fare proportion for service over the whole eight miles of line. The franchise fixes only two local fares, that which relates to service over the whole line and that which relates to passage between Rockville Center and Freeport.

We are unable to find any such parity of situation here as existed in the Edwards case, *supra*, where the words in question applied definitely to the local fare and were repeated as to the joint fare. Here they are confined to action upon the share of the joint fare. It is our duty, of course, to construe a franchise provision according to the apparent intent of the granting municipal body, even though in so doing an unusual and perhaps illogical arrangement of words or sentences may result, but it is beyond our duty or power to give a meaning to words for which we can find no evident intent on the part of the grantor. It should be repeated that no opinion is or can be expressed here upon the reasonableness of respondent's present fares, and complainants in respect thereto are not barred by the franchise fares or by this decision.

The complaints must be dismissed.

In the Matter of the Complaint of EMPLOYEES OF HAL-COMB STEEL COMPANY of Syracuse *against* SYRACUSE, LAKE SHORE AND NORTHERN RAILROAD COMPANY.

In the Matter of the Complaint of RESIDENTS OF SYRACUSE *against* SYRACUSE, LAKE SHORE AND NORTHERN RAILROAD COMPANY as to increased rates of fare between Syracuse and Long Branch.

In the Matter of the Complaint of H. FREEMAN JOHNSON AND OTHERS *against* SYRACUSE, LAKE SHORE AND NORTHERN RAILROAD COMPANY.

A rehearing will not be granted pursuant to section 22 of the Public Service Commissions Law for the purpose of allowing the applicant to present matters for the consideration of the Commission which it did not present upon the first hearing, without a sufficient reason being presented why such matters were not brought to the attention of the Commission on the first hearing.

A street surface railroad operating within the limits of a city or incorporated village and without such limits and transporting passengers from the city or village to the unincorporated territory upon its line is not absolutely entitled by law to charge five cents for that portion of the ride which lies within the limits of the city or incorporated village in addition to a charge made for the ride over the line without the limits of the city or incorporated village. The charge made for such ride is subject to the power of the Commission to reduce the same provided it is found to be unjust or unreasonable. The principle laid down by the Commission that in such case the existence of the city line has no legal bearing upon the rate of fare to be charged reaffirmed.

In case it is claimed that a part of an order made by this Commission is erroneous because unwarranted by law, the proper practice is not a motion for a rehearing on the whole case, but a motion to modify the order by striking out the erroneous part.

Decided August 8, 1912.

William Nottingham for Syracuse, Lake Shore and Northern Railroad Company.

STEVENS, *Chairman*:

The Syracuse, Lake Shore and Northern Railroad Company has filed a petition in each of the above entitled cases for a rehearing therein pursuant to section 22 of the Public Service Commissions Law. The facts in each case are as follows:

On the 11th day of July, 1912, an order was made in the Halcomb Steel Company case reducing the rate of fare to be charged by the railroad company between its terminal in the city of Syracuse and Stop 4 on its line outside of the city of Syracuse from 15 cents for a round trip between said points to 10 cents, with the option to the company to put in a one-way rate of not exceeding 5 cents in each direction between its Syracuse terminal and Stop 4, the order to take effect the 10th day of August, 1912, and to continue in effect for a period of at least three years. The rate which was the subject of investigation in this case was an increase made October 6, 1911. The one-way fare between the points named had been for some time and still was 10 cents, and prior to October 6, 1911, the round-trip fare especially established for the men who reside in Syracuse and labor at the works of the Halcomb Steel Company was the same as the one-way fare.

On the 23rd day of July, 1911, an order was made by this Commission in the Long Branch case requiring the company to cease and desist on or before August 10, 1912, from continuing its practice of limiting its summer season round-trip tickets sold at 20 cents to one day for use in traveling over its line between Syracuse, the common center, and Stop 11, known as Long Branch, and the company was required by said order from and after August 10, 1912, and for a period of at least three years thereafter, to sell its 20 cent round-trip tickets for transportation during the period between May 1st and September 30th inclusive in each year, under terms and conditions making them good for use by the passenger during the period of not less than thirty days from date of sale. It was also by the

same order required to cease and desist on or before August 10, 1912, from charging its present cash fare of 15 cents for a single trip between Stop 1 on its line in Syracuse and Stop 11 on its line known as Long Branch, and the maximum fare for said single trip was established by said order at a sum not exceeding 10 cents.

On the 23rd day of July, 1912, an order was made by this Commission in the Johnson case requiring the company to desist from charging its present cash fare of 10 cents for one-way transportation between any point in Fulton north of Fourth street and Stop 28 on its line outside of the city, and the maximum fare for one trip over its line between any point in Fulton north of Fourth street and Stop 28 on its line outside of said city was fixed by said order at 5 cents.

In each of the above cases a written opinion was prepared by Commissioner Decker and approved by the Commission. in which the matters in controversy were fully discussed, and for this reason they require no re-statement at this time.

In each of the above cases the respondent states three grounds upon which it desires a rehearing. The following is quoted in full from the application in the Halcomb Steel Company case:

That said order reducing fares will in its judgment materially decrease the receipts of your petitioner from its said railroad, and that said reduction of fares made by said order is unjust and unreasonable, having due regard among other things to a reasonable average return upon the capital actually expended and the necessity of making reservation out of income for surplus and contingencies, and that the income of your petitioner from its property and operations is insufficient to afford reasonable return upon the capital invested in the construction and equipment of its said railroad and that therefore said reduction of fares amounts substantially to a confiscation of the property of the said railroad company, and that the fare charged prior to said reduction afforded but a reasonable compensation for the services rendered.

The second ground upon which the respondent asks for a rehearing is also quoted from the same petition, as follows:

That your petitioner desires to make further proof relating to the cost of the construction and equipment of its railroad property in order

to establish that its fares attacked in this proceeding before said reduction were just and reasonable and no higher than it was entitled to charge by law.

It is not alleged in the petitions for rehearing whether the matters suggested in these extracts were or were not presented by the respondent for the consideration of the Commission in deciding the case. If they were not presented to the Commission for consideration and it was permitted to pass upon the matters in controversy without its attention being called to such matters, it was the fault and laches of the company, without the slightest excuse being suggested in the application why it did not present such matters and make them a part of the facts upon which the decisions were to be based. The practice of trying a controversy before the Commission and omitting to present some material view of the case for consideration, and then, after an adverse decision, asking to have the case reopened in order that such view may be litigated, is one which the Commission can not sanction. The proper dispatch of its business, and proper regard for the time and expense of complainants, forbid the investigation of complaints by piecemeal.

These cases were not hastily disposed of. The respondent was fully advised before final submission of all the matters which it ought to present for determination, and if it omitted properly to try its case, it should not have a re-trial without at least presenting some good reason why it failed to present a material defense in the first instance.

If, on the other hand, the matters under discussion were presented for the consideration of the Commission, there is no allegation that they were overlooked or in any manner disregarded by the Commission. It must be observed that the Commission is not unfamiliar with the amount of capital actually expended in the construction of respondent's road, nor is it unfamiliar with the fact that a reduction in fare is frequently accompanied by an increase of gross revenue.

The Commission sees no just reason for reopening these cases upon the grounds above stated.

The third ground upon which a rehearing is asked is as follows:

That in view of the aforesaid order of the Commission, there seems to be involved in this proceeding the question as to whether or not the railroad of your petitioner is a street surface railroad within the limits of the city of Syracuse and therefore subject to the provisions of law which entitle it to charge a 5 cent fare for any transportation given within the limits of said city over whatever distance; that said question was not directly raised at the former hearing and your petitioner had no opportunity to present its views with reference thereto and desires to be heard further in relation to said matter. That it is important to your petitioner to have it definitely determined whether it has the right to charge a fare of 5 cents for the transportation of persons upon its cars within the said limits of the city of Syracuse in addition to the fare charged its passengers outside the city limits, and your petitioner desires to be heard before said Commission with reference to said question.

The petitioner seems to think that it may be a street surface railroad within the limits of the city of Syracuse, and therefore "subject to the provisions of law which entitle it to charge a five cent fare for any transportation given within the limits of said city over whatever distance". The law referred to is section 181 of the Railroad Law, being a part of article 5 of that law, and the pertinent provisions are as follows:

No corporation constructing and operating a railroad under the provisions of this article shall charge any passenger more than five cents for one continuous ride from any point on its road or on any road, line or branch operated by it or under its control to any other point thereon or any connecting branch thereof within the limits of any incorporated city or village.

This provision is merely restrictive in its terms, fixing a maximum fare of five cents for the service mentioned. It does not fix five cents as a fare which the respondent is entitled to charge as a matter of right, which right can not be taken away from it by the legislature or this Commission. The case of *Business Men's Association of Ticonderoga vs. The Delaware and Hudson Company*, 2 P. S. C., 2nd D., page 78, is in point, and this case has been affirmed by the

Appellate Division of the Supreme Court (*People ex rel. D. & H. Co. vs. Pub. Service Com.*, 140 A. D. 839).

But beyond this, section 181 of the Railroad Law itself contains the following language:

The legislature expressly reserves the right to regulate and reduce the rate of fare on any railroad constructed and operated wholly or in part under such chapter or under the provisions of this article; and the Public Service Commission shall possess the same power to be exercised as prescribed in the Public Service Commissions Law.

We think that the statute does "definitely determine whether or not the respondent has the right to charge a fare of five cents for the transportation of persons upon its cars within the city limits of Syracuse in addition to the fare charged its passengers outside of said limits," without being subject to the power of this Commission to reduce such fare below the sum of five cents.

Subdivision 4 of section 33 of the Public Service Commissions Law is obviously not applicable to these cases, whatever its interpretation may be.

It should be further observed that in two cases against the same management decided in June, 1912, upon a written opinion, it was distinctly held by the Commission that for travel in and out of the city the location of the city line is wholly immaterial. The orders in these cases have been accepted by the respondent, and were so accepted before the decision in any of the cases now under consideration. The respondent was, therefore, before these cases were decided, fully advised of the position of the Commission upon this question; and if it were dissatisfied with that position, it should have made objection before final decision to the application of the principle in the cases still under litigation.

In the Long Branch case the respondent issues and sells round-trip tickets between its Syracuse terminal and Long Branch, or Stop 11, between May 1st and September 30th, for 20 cents. These round-trip tickets have a one-day limit, and the order of the Commission with respect to them was that they should be good for thirty days instead of one day

between May 1st and September 30th. The respondent in its application states that "it (said order) further extends the period during which the aforesaid excursion round-trip tickets may be used to November 1st, and thereby compels your petitioner to transport passengers between Syracuse and Long Branch at reduced excursion rates during the month of October, which in view of the light travel during said month is unjust and unreasonable". If the proper interpretation of the order is that the 20 cent round-trip ticket sold on September 30th is good at any time during the month of October, the Commission is willing to entertain a motion to modify the order in that respect, and this is the proper practice instead of an application for a rehearing in the case. Such a motion may be made if the respondent so desires, without prejudice upon the denial of this application.

The respondent further objects that this Commission has no power or authority to prescribe the terms or conditions under which it shall sell reduced or excursion tickets. It is probable that this view of the respondent is based upon the proviso of subdivision 4 of section 33 of the Public Service Commissions Law, reading as follows:

Provided that all special round-trip excursion tickets the sale of which is limited to less than thirty days . . . shall be deemed exempt from such regulation by the Commission.

The preceding portion of this subdivision impliedly at least recognizes the power of the Commission to require the sale of and to prescribe just and reasonable fares for round-trip excursion tickets; and the proviso just quoted takes special round-trip excursion tickets, the sale of which is limited to less than thirty days, from under the powers recognized by the preceding portions of the subdivision.

In this case the sale of these special round-trip excursion tickets is not limited to less than thirty days, but as we understand, the sale is continued from May 1st to September 30th, and the restriction of one day is not upon the

time of sale but upon the time of use — an entirely different thing.

Subdivision 2 of section 49 provides that unjust and unreasonable regulations and practices of any railroad corporation are within the regulative powers of this Commission, and that the Commission shall determine upon complaint the reasonable and just practices to be thereafter observed by the railroad corporation.

Under all the provisions of the Public Service Commissions Law, it would seem that the Commission has power to regulate the terms of use of round-trip excursion tickets except in the precise case mentioned in the proviso hereinbefore quoted, and that is not this case.

In this case, in addition to the order with reference to the round-trip excursion tickets, there was a reduction of fare. A rehearing should not be granted so as to interfere with the reduction of fare upon grounds previously stated. It may, however, be proper to hear the respondent if it should so desire upon the question of law which is discussed. This can easily be effected by a motion to modify the order already made in that particular without a reopening of the case, since nothing but a question of law is raised as to the power of the Commission.

The following disposition of these cases should be made: No rehearing should be granted in any one of them. The reduced rates of fare should be kept in operation long enough to determine by practical experience whether or not they produce the injurious effects feared by the respondent. It should be at liberty after a reasonable time to move again for a rehearing upon this ground provided the facts developed by operation show that such course is warranted. The respondent should be at liberty to make a motion to modify the order in the Long Branch case with reference to the round-trip excursion tickets so that such tickets shall not be good for use after September 30th, or to strike out the entire portion of the order relating to such tickets, or both, as it may desire.

In the Matter of the Complaint of RESIDENTS OF DAYTON, Cattaraugus County, *against* ERIE RAILROAD COMPANY, concerning the station at Dayton.

Improvements to the station of the Erie Railroad Company at Dayton, Cattaraugus county, ordered.

Details of defective condition of said station discussed.

Decided August 15, 1912.

J. E. Bixby for complainants.

T. H. Burgess for Erie Railroad Company.

STEVENS, *Chairman*:

The people of Dayton make very bitter complaint against the station accommodations afforded by the Erie railroad at that point. The Erie has made answer to the complaint, practically admitting that the situation is inadequately taken care of at present, and offering to make improvements which will be hereinafter specified. Hearings have been had. A considerable time has been allowed to elapse since said hearings, the Commission indulging the hope that the respondent would feel, upon reflection, that the situation demanded a new station in a more favorable location. The respondent, however, does not accede to this view, and accordingly the case must be disposed of upon the evidence already taken.

General Conditions:

The station and its surrounding platforms lie between the tracks of the Allegheny division and the tracks of a spur of the Buffalo and Southwestern division. The general direction of these tracks at this point is north, the Allegheny Division tracks lying upon the east and the Southwestern tracks upon the west.

Upon the east are three tracks; upon the west are two tracks. To the south of the station a highway crosses these tracks, the center of the highway being 60 feet from the

southerly end of the existing platform. Another highway crosses the tracks north of the station.

The station building is substantially 87 feet long by 18 feet 6 inches, external measurement. The platform on the easterly side of the station building is 8 feet 8 inches wide, and on the westerly side it is about 9 feet 6 inches in width. The platform on the south side of the station building is 50 feet wide, and on the north side about 41 feet. The distance from the station building to the milk track north therefrom is 51 feet.

The station building has now but one waiting room, the interior measurement being about 17 by 23 feet. There is also what is known as a registry room, used to some extent as a smoking room, about 9 by 17 feet. The freight room is situated at the southerly end of the building, and is now about 17 by 38 feet.

Traffic:

The local passenger traffic at this point is small. The importance of the station lies in the fact that it is a transfer point between two divisions. The principal congestion is about 6 o'clock in the afternoon, at which time four trains arrive at the station within a period of half an hour, two upon the Allegheny division and two upon the Southwestern. The following table shows the schedule of time in force at the time of the hearing, with the directions of the trains:

	<i>Arrive</i>	<i>Leave</i>
Dunkirk to Salamanca.....	5:55	6:20
Salamanca to Dunkirk.....	6:03	6:18
Buffalo to Jamestown.....	6:06	6:14
Jamestown to Buffalo.....	6:16	6:25

It would seem from this table that passengers from points between Dunkirk and Dayton desiring to go to Buffalo have to wait 30 minutes. Passengers going from the south or from Salamanca to Buffalo have to wait 22 minutes. Passengers from between Dunkirk and Dayton desiring to go to Jamestown have to wait 19 minutes. Passengers from

Salamanca to Jamestown have to wait 11 minutes. Passengers from Buffalo to Salamanca have to wait 14 minutes; and from Buffalo to Dunkirk, 12 minutes. Passengers from Jamestown to Salamanca have to wait 4 minutes; and from Jamestown to Dunkirk, 2 minutes.

Number of Transferred Passengers:

The respondent, the Erie Railroad Company, gave evidence of the following number of passengers transferred at this station during the entire days named:

1911: April 17, 210; April 18, 166; April 19, 142; April 20, 137.

The respondent also gave evidence that the number transferred at about 6 o'clock in the afternoon was as follows: April 17, 106; April 18, 85; April 19, 79; April 20, 80.

The complainants gave evidence of 111 transferring at 6 o'clock on November 28, 1910, and 126 on November 26th. The complainants also gave evidence of a total of 394 transferring on the 24th of December for the entire day.

The conditions existing at this station at the meeting of the four trains about 6 o'clock in the afternoon are very familiar to the Chairman of the Commission, he having observed the same practically once a week for upward of four years. The conditions at other times are also familiar to him, he having been at the station at other hours of the day frequently.

The proper method to consider this case is to take up the separate points of complaint and consider them by themselves.

Capacity of Waiting Rooms:

There is at present practically but one waiting room, which is substantially 17 by 23 feet, thus containing 391 square feet of floor space. The height of the room is between 9 and 10 feet, so that the number of cubic feet in the room is about 3900. The sole ventilation is by the doors, of which there are two. The windows are never used for this purpose so far as the evidence or observation goes, and an inspection

shows that they are nailed down so that it is impossible to raise them without removing nails which are firmly driven into the wall. The heating is by a coal stove placed in the middle of the room. It is not proposed to increase the capacity of this waiting room, or to change it in any respect.

Comment: The conditions in this waiting room are intolerable. It is inadequate in size. At times, when the weather permits the doors to be opened, the condition as to ventilation is perhaps such as not to deserve criticism. In cold and stormy weather, when the doors must be closed, there is no ventilation, and it is entirely unfit at times for occupancy as a waiting room, owing to the lack of ventilation and the method of heating, which vitiates the air very rapidly.

What is known as the registry room is at present about 9 by 17 feet, inside measurement, thus containing about 153 square feet floor space. It has a few seats and is used to some extent as a waiting room. It is proposed to enlarge this room by adding thereto a space about 11 by 17 feet taken from the freight house. As thus enlarged it will contain a floor space of practically 326 square feet, the dimensions of the room being 16 feet 6 inches by 19 feet 9 inches. As enlarged, so far as appears from the plans submitted, the only ventilation will be by the two doors. The room will be large enough for the purposes for which it is designed. The ventilation will be bad, and would be bad under any conditions, the class of people using it for a smoking room being such that it is their pleasure to vitiate and defile the atmosphere. No better conditions should be insisted upon for them.

Conclusion: More waiting room space is required for women, children, and men whose sensibilities require them to have a measure of pure air.

Freight House:

The freight house at present is substantially 39 feet in length by 17 feet in width. There is complaint on the part

of consignees that it is inadequate in size and that it is difficult at times to get freight out of it, and that at times freight has to remain exposed upon the platform because of lack of size of the freight house.

The company proposes to reduce the size by cutting off 11 feet from the northerly end, thus reducing its dimensions to practically 17 by 28 feet. The agent testifies that the space thus remaining will be sufficient for freight purposes.

Comment: In view of the statement of facts, it is impossible to determine whether the freight house will be adequate in size if its dimensions be reduced as proposed by the company.

Roof of Station Building:

It is complained that the station building has no overhang to the roof, there being only a slight projection of the eaves of say one foot from the side of the building; and that owing to this fact, in rainy weather the roof water is not properly taken care of and comes down on the platforms adjoining the building.

This complaint is not disputed by the respondent, and the respondent recognizes its justice by proposing to make an overhang by adding to the roof.

Comment: The proposed overhang takes care of the objection adequately.

Platform Space:

The platform space as it exists at present may be described as follows: South of the station it is 50 feet in length; north of the station it is 51 feet in length, measuring to the tracks upon which the milk truck stands. It is difficult to determine where the platform of this end of the station ends, but it is practically about 41 feet north of the building. The platform on the east side of the building is 8 feet 8 inches in width, and on the west side of the building 9 feet 4 inches in width at the north end, each platform being an inch or two wider at the southerly end.

In its proposed plan the company, instead of enlarging, diminishes the platform space as follows: The platform upon the south end is to be practically 38 feet in length instead of 50 feet in length. Upon the north end it is to be 38 feet in length instead of 41 feet in length. The platform on the east side of the building next to the running tracks is to remain as at present. Upon the west side the platform is to be widened somewhat: the precise distance does not appear, but it is practically two feet.

Comment: The platform area as at present constituted is inadequate. It is not sufficient properly to take care of the crowds which are frequently there. Upon the southerly end of the station building it is frequently used for the storage of freight; and in addition to accommodating the public, the platform is used for the storage of the trucks used at the station, consisting of 8 large trucks which are generally placed upon the platform at the southerly end. These trucks frequently stand upon the platform loaded with freight upon the arrival of trains, and of course are in use while trains are there for transferring baggage from one train to another. The platform being inadequate at the present time for the accommodation of the people who are obliged to wait, the proposal of the company to diminish the size of the platform is inadmissible.

Shelter from Weather:

At present the only shelter from rain or storm is that afforded by the waiting room. The company proposes to remedy this difficulty by constructing canopies at both ends of the station building, which canopies are substantially each 16 feet in width by 36 feet in length.

Comment: These canopies would be an excellent addition to the station. They would afford during the summer season protection from rain and from the hot sun, and with a few seats provided outside would supplement the waiting room space very nicely, and in proper weather conditions would

probably afford adequate waiting room space for the station. They are not, however, of any particular benefit in the winter season except they might shelter to some extent during a snow storm. They afford no protection against cold, and therefore do not supplement the waiting room space during the winter season. In short, they serve exceedingly well the purposes of a canopy, but do nothing more.

Platform Space with Reference to Trains:

The length of the platforms upon the Allegheny division is not seriously complained of. The trains are short, and in practical working the platforms can be accepted as reasonably adequate. It would be better if they were somewhat longer, but the matter is not serious enough to demand further comment.

Upon the Southwestern division, or west side of the station building, the matter is very serious. The total length of the proposed platform is 163 feet. Trains are frequently run upon this division which consist of 4 coaches and 3 baggage, express, and milk cars. The length of the coaches is shown by respondent's evidence to be 70 feet, and of the baggage, express, and milk cars about 65 feet, so that the length of the 7 cars combined is 475 feet. The length of the 3 baggage cars is 195 feet, being 32 feet longer than the length of the entire platform. In the handling of the freight, milk, and baggage, the baggage cars stop at the platform so that they occupy substantially the entire platform, while the passenger coaches have no platform whatsoever for their use. A train coming from the south and going to Buffalo runs into the station with the engine ahead. The front baggage car stops about where the milk tracks are, and frequently the only way of getting in or out of the coaches from or upon the platform is at the front end of the smoking car. The coaches in this case extend back across the public highway. A train going west to Jamestown backs in. In this case the coaches extend to the north of the platform, so that passengers have to alight north of the platform except that

generally the front platform of the smoking coach is opposite the north end of the station platform. Of course these conditions are not invariable, and the above is a description of what usually happens. The platform is utterly inadequate as to length on this side of the station, and no plan can be considered which does not provide a reasonable length of platform at this point.

It is true that north of the platform some cinders have been spread which constitute to some extent a cinder walk. Cinders are utterly unfit for this purpose and can not be considered as in any way affording reasonable or proper accommodations to the public.

Character of Platform:

The existing platform is composed of crushed stone of some description. Owing to its characteristics it is intolerable as a platform. The company very properly recognizes its poor quality and proposes to substitute therefor a platform of concrete. A concrete platform can not be excelled for this purpose at this place, and the proposition of the company as to character of platform is therefore acceptable in every respect.

Approaches to Freight House:

The approach to the freight house is only from the south, from the public highway crossing the tracks. Severe complaint is made by consignees having occasion to use this freight house that the approaches are utterly inadequate owing to the constricted space between the running tracks, the switching of trains, and the general difficulty of getting freight out. It is unnecessary to recapitulate the evidence. It is wholly undisputed.

The company makes no proposition whatsoever to better the conditions in this respect. It is difficult to see what the company could do to better these conditions, assuming that the station remains in its present location. There is only a certain amount of space available which can not be enlarged owing to the location of the tracks. If the station remains

between the running tracks of the two divisions, it does not appear to be practicable to improve the freight conditions materially.

Toilet Accommodations:

There is no dispute in the evidence about these conditions. The facts are set out fully in the complaint, which is supported to some extent by the evidence. The allegations in the complaint are not denied, either in the answer or by the evidence.

The company makes no proposition to improve these accommodations in any respect. It does allege that it has not a sufficient water supply so that it can use water in this connection. Its proof upon this point is not satisfactory. It is also possible to improve the accommodations without the use of water to some extent, but this can only be accomplished by a desire on the part of the respondent to afford decent accommodations to its patrons.

General Appearance of the Station:

The general appearance of the station building is, to say the least, not inviting. It was constructed many years ago and along lines which would not be approved at the present time. It would be very regrettable to have it perpetuated, but upon this point the Commission would not feel that any power which it may have should be exercised. The usual disfiguring advertising signs are there, and of course accentuate the situation.

General Conclusions:

The foregoing detailed review of the situation shows that the proposed improvements of the respondent are not adequate in respect of —

- (a) Waiting rooms;
- (b) Platform space;
- (c) Length of platform;
- (d) Approach to freight house;
- (e) Toilet accommodations.

It is also uncertain whether the freight house accommodations will be sufficient if made as proposed.

Change of Location of Station:

At the first hearing in this case there was a discussion regarding change of location. It is unnecessary to recite what occurred on that occasion, except to say that an adjournment was had to enable the company to investigate that question and to report to the Commission. At the final hearing the company made no report as to what it had investigated or what plan it had considered. The superintendent of the Allegheny division simply testified that he had heard that the proposed improvements would cost \$30,000, which was considered to be excessive in view of the benefits to be derived. It is unknown to the Commission what was covered by this estimate of \$30,000. The engineer was not produced nor was there any description given of the difficulties to be overcome or the plan passed upon. The condition of the case in this respect is unsatisfactory.

It would be much better to have the station upon the Buffalo and Southwestern division instead of the Allegheny division. It is true that the expense might be so great as to prohibit the change. It is true that a change should not be made at an excessive cost. A station building, adequate in size and complete in its appointments and which would last for an indefinite time in the future, could be constructed for \$6000. That the necessary changes in track layout would cost \$24,000 does not seem reasonable in the absence of detailed engineering estimates.

The Commission does not feel justified in ordering a new station, and accordingly must confine itself to directing such repairs and changes with respect to the existing station as the surroundings permit.

**In the Matter of the Discontinuance of Operation of the
CAYUGA HEIGHTS LINE of the ITHACA STREET RAILWAY
COMPANY by JOHN W. DWIGHT and ROGER B. WILLIAMS,
JR., as Receivers of the Property of the ITHACA STREET
RAILWAY COMPANY.**

The receivers of the Ithaca Street Railway Company discontinued the operating of street cars on a track known as the Cayuga Heights line. The company had been operating over this line for several years prior to the receivership, and the receivers had continued operating for a period of six months lacking one day. The line was constructed by the Ithaca and Cayuga Heights Railway Company about the year 1905, and upon completion of construction was leased by that company to the Ithaca Street Railway Company for a term of ninety-nine years commencing the 1st day of October, 1905. At practically the same time, the Ithaca Street Railway Company became the owner of the entire capital stock of the Ithaca and Cayuga Heights Railway Company, and also guaranteed the payment of all of the bonds issued by that company, amounting to \$40,000.

The Ithaca Street Railway Company commenced operating the line and continued operations until the receivership. Subsequently the Ithaca Street Railway Company took various actions looking toward a merger of the Ithaca and Cayuga Heights company, and reported to this Commission that such merger had taken place. Also, in 1907 it procured authorization from the Board of Railroad Commissioners to place a mortgage upon its property, and in such mortgage it described the Cayuga Heights line as being owned by it and subjected it to the lien of the mortgage. It was upon the foreclosure of this mortgage that the receivers were appointed. The bonds issued by the Ithaca and Cayuga Heights Railway Company to the amount of \$40,000 were retired by the Ithaca company by issuing to the holders thereof other bonds of like par value, issued upon the security of the mortgage being foreclosed, and which described the Cayuga Heights line as a part of the property of the Ithaca Street Railway Company. In the proceedings to merge the Cayuga Heights company, no certificate was ever filed with the Secretary of State, as is required by section 15 of the Stock Corporation Law.

Upon a proceeding requiring the receivers to show cause why they should not be required to resume operations over the Cayuga Heights line, the position taken by them was that the Ithaca Street Railway

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Company was merely the lessee of that line, and as receivers they had the power to discontinue operations under an executory lease of the character of the one in question. *Held* —

1. That the receivers are subject to the jurisdiction and supervision of this Commission, and are subject to the exercise of all the powers conferred upon the Commission by sections 50 and 51 of the Public Service Commissions Law.

2. That under all of the circumstances of the case, which are fully detailed in the opinion, the receivers had no power to discontinue operations upon the Cayuga Heights line without the consent of the Commission.

3. That the Cayuga Heights property having been described in the mortgage as the property of the Ithaca Street Railway Company, and the order of appointment having constituted the receivers the receivers of that particular property, they were not at liberty, being mere custodians of the property, to disavow the ownership of the property by the Ithaca Street Railway Company, and that it was for the court appointing them to pass upon that question.

4. That the receivers having retained in their possession a part of the alleged leased property and continuing the use of the same, were not at liberty to disavow the lease as to the remainder of the property.

Decided September 18, 1912.

Charles E. Hotchkiss attorney for the receivers.

J. T. Newman and *C. H. Blood* for various interests.

STEVENS, *Chairman*:

Beginning about the 25th day of July, 1905, the Ithaca Street Railway Company operated continuously from that date to the 6th day of January, 1912, a certain railroad track in the city of Ithaca which will be designated as the Cayuga Heights line, which extends from the Thurston Avenue junction northerly to a point opposite the residence of Charles Ezra Cornell, a distance of about 4200 feet. On the 6th day of January, 1912, John W. Dwight and Roger B. Williams, jr., were by an order of the Supreme Court of

the State of New York duly appointed temporary receivers *pendente lite* of the property of the Ithaca Street Railway Company. As such receivers they immediately qualified and took possession of the property of that company, and under the order of the court have been operating it since said January 6th, and are now in possession of the property of the company and operating the same as a street railway. The receivers operated the Cayuga Heights line until the 5th day of July, 1912, and on this date they discontinued operations over said line. The fact of such discontinuance having been brought to the attention of the Commission, it issued an order requiring the receivers to show cause why they should not be required to resume operations over it. Upon the return day of the order they appeared by counsel, and certain citizens and associations of the city of Ithaca also appeared in the proceeding asking for an order of the Commission requiring the receivers to resume operations.

The answer interposed by counsel for the receivers was in substance that the Cayuga Heights line was not the property of the Ithaca Street Railway Company, but was a leased line, and that the order appointing the receivers provided expressly that they should have six months' time in which to investigate the question of any leases that might be held by the Ithaca Street Railway Company as lessee, and in which to exercise their option as to whether they should continue to act under the leases or to decline to proceed further; that the receivers tested out the operation of the property for six months, the time limited by the order, and at the expiration of the six months they reached the conclusion that the longer operation of this piece of track was a great burden upon the balance of the property and that they were not justified in continuing operations over it.

The proposition of law for which the receivers, through their counsel, contended, was stated as follows by counsel:

These receivers do not own the lease. They are not vested with the title to the lease. They are not vested with the obligation to affirm

that lease or to operate under it. They are not the assignees of the lease. They have no shadow of title to it whatsoever. They are mere custodians of the court, the mere arm of the court to operate under the instructions of the court, and if they find that it is a losing proposition on the whole, all things considered, that they should not burden and must not burden the other properties in their hands and affect the rights of the creditors, stockholders, and other persons interested in the Ithaca Street Railway Company by taking the earnings of that company to pay for the enormous deficits in the operation of the so called leased line. Therefore, acting under that authority, the receivers have ceased to operate.

The receivers and the parties asking for the resumption of operations over the line have submitted to the Commission certain stipulations, and also a mass of evidence which they have taken upon the facts in the case. For the sake of clearness, there will first be stated the facts upon which the receivers rely for their defense, without reference to those other facts which are relied upon by their opponents. These latter facts will be stated subsequently in their order.

The Ithaca and Cayuga Heights Railway Company was incorporated pursuant to the laws of this State on or about September 27, 1904. The moving parties in the incorporation were Jared T. Newman and Charles H. Blood, who entered into an agreement with the Ithaca Street Railway Company for the incorporation of said company and the construction of a road by it, such agreement being in writing and made a part of the exhibits in the case; but it seems unnecessary to set that forth in detail.

The Cayuga Heights line is a part of the road which was constructed by the Ithaca and Cayuga Heights Railway Company. The cost of construction and equipment of the road was \$17,405.17, \$40,000 of which was furnished by Newman and Blood, who also furnished one-half of the excess above \$40,000, to wit \$3702.58. The remaining one-half of such excess was paid by the Ithaca Street Railway Company. A settlement of the account between Newman and Blood on the one hand and the Ithaca Street Railway Company on

the other was made on or about the 6th day of November, 1905. On that day the following transactions took place: All of the stock of the Ithaca and Cayuga Heights company was surrendered and a stock certificate for five hundred shares, being the entire capital stock, was duly issued to the Ithaca Street Railway Company, and has ever since been and now is held by the said Ithaca Street Railway Company. It has at all times since said date been the owner of the entire capital stock of the company. On the same day a lease of the physical property of the Cayuga Heights company was executed by that company to the Ithaca Street Railway Company, for a term of ninety-nine years commencing on the 1st day of October, 1905, and ending the 30th day of September, 2004. The lease covered the entire physical property of the lessor, which at that time consisted of something over two miles of track, 5 double motor equipments, 4 open car bodies with trucks, 2 closed car bodies, 2 miles of feeder wire extending from the power house on State street to Renwick, and tools and supplies on hand of the value of \$100. The cost of the equipment mentioned is stated in the lease to have been \$12,342.75, and is a part of the construction cost hereinbefore mentioned.

The Ithaca and Cayuga Heights company also executed a first mortgage upon all of its property to secure an issue of bonds to the amount of \$40,000, which bonds were issued to Newman and Blood in payment for the moneys advanced for the construction of the road.

The status thus established is claimed by the receivers to exist, so far as the legal relations of the two companies are concerned, at the present time. They assert that the Ithaca Street Railway Company has at all times been in possession and operation of the leased property under and by virtue of the terms of the lease and not otherwise, and it is upon these facts that they base their right to cease operations over the Cayuga Heights line.

They cite in support of their contention a well known line of cases which unquestionably establish the following propositions of law:

The ordinary chancery receiver is clothed with no estate in the property, but is a mere custodian of it for the court; and, by special authority, may become an officer of the court to effect a sale of the property, if that be deemed necessary, for the benefit of the parties concerned. If the order of the court, under which the receiver acts, embraces the leasehold estate, it becomes his duty, of course, to take possession of it. But he does not, by taking such possession, become assignee of the term, in any proper sense of the word. He holds that, as he would hold any other personal property involved, for and as the hand of the court, and not as assignee of the term.

The rule is well settled that a receiver in taking possession of a leased road is entitled to a reasonable time in which to decide whether the interests of his trust will be better subserved by making the lease his own or by returning the property to the lessor.

It is unnecessary to cite any of the cases in which this principle has been enforced, since the proposition has become so elementary in the law that there is no question to be raised about it upon the facts hereinbefore stated. There are, however, a series of other facts to which attention should now be called, and which it is claimed change the situation entirely from that hereinbefore presented. These facts are as follows:

Prior to about May, 1907, practically all of the stock of the Ithaca Street Railway Company was owned by one E. G. Wyckoff. At some time in the Spring of 1907 Wyckoff seems to have transferred his interest in this company to one A. H. Flint, and on the 21st day of May, 1908, Flint was the owner of 3233 shares out of a total of 3250. At a meeting of the board of directors of the company held May 25, 1907, at which Mr. Wyckoff, who then owned 3219 shares of stock, was present, he being president of the company and director at that time, resolutions were unanimously adopted as follows:

Resolved, That the consent of the Ithaca Street Railway Company as the owner of all capital stock of the Ithaca and Cayuga Heights

Railway and of the Cayuga Lake Electric Railroad Company be given to the transfer by said Ithaca and Cayuga Heights Railway and by said Cayuga Lake Electric Railroad Company of all the property owned by them respectively to the Ithaca Street Railway Company, the deeds of transfer to provide that the Ithaca Street Railway Company as such grantee shall assume all the obligations of said companies respectively.

Be it further Resolved, That the deeds of transfer of the Ithaca and Cayuga Heights Railway and of the Cayuga Lake Electric Railroad Company made pursuant to such consent be accepted.

Be it further Resolved, That in the event it shall be deemed desirable by the executive officers of the Ithaca Street Railway Company to effect a consolidation of the Ithaca Street Railway Company with the Ithaca and Cayuga Heights Railway and Cayuga Lake Electric Railroad Company in lieu of the transfer of the properties of said last mentioned companies to the Ithaca Street Railway Company, and the dissolution of said Ithaca and Cayuga Heights Railway and said Cayuga Lake Electric Railroad Company, that said officers be authorized to bring about such consolidation and take the necessary proceedings therefor.

It is further stipulated in this case that at the meeting of directors of the Ithaca and Cayuga Heights Railway Company held on the same day, the said directors being also the directors of the Ithaca Street Railway Company, resolutions substantially similar to the foregoing were adopted on behalf of that company.

At a subsequent meeting of the directors of the Ithaca Street Railway Company held on the 21st day of May, 1908, the following resolution was adopted:

Whereas, Resolutions were passed by the Ithaca Street Railway Company at a stockholders' meeting heretofore held on the 25th day of May, 1907, and at a directors' meeting of the Ithaca Street Railway Company held on the same day and date, authorizing the merger of the Ithaca Street Railway Company properties and Ithaca and Cayuga Heights Railway Company properties and the Cayuga Lake Electric Railroad Company properties, and the officers of the Ithaca Street Railway Company were empowered to execute all papers necessary to complete such merger; and

Whereas, Said officers in pursuance of such resolutions did execute the necessary papers in order to merge the said properties; now therefore be it

Resolved, That the board of directors hereby ratify all acts of said officers in executing the necessary papers to merge the said properties, and hereby ratify the merger of all the said properties.

The record book of the Ithaca Street Railway Company containing the minutes of the stockholders' meetings and of the directors' meetings of that company do not have any record of any stockholders' meeting held on the 25th day of May, 1907, and show no resolution similar to that stated in the foregoing preamble to have been adopted thereat. There is no record of any previous resolution of the stockholders or directors of either company authorizing the merger, nor is there any record of any meeting of either stockholders or directors from June 27, 1907, to May 21, 1908.

On the 21st day of June, 1907, the Board of Railroad Commissioners of the State of New York authorized the Ithaca Street Railway Company to issue a mortgage upon its property for \$750,000. This mortgage was in fact executed by the president of the company on its behalf on the 4th day of June, 1908, but bears date as of the 1st day of July, 1907. The mortgage was executed to the Carnegie Trust Company, to secure an issue of bonds to the aggregate amount of \$750,000. The granting clause thereof, after the formal words of grant and bargain and sale, describes (a) the railroad of said company constructed and to be constructed in the city of Ithaca; (b) "and all properties described in the first mortgage made by the Ithaca Street Railway Company to the Farmers Loan and Trust Company of date July 1, 1892, and a second mortgage of the Ithaca Street Railway to Alfred Hand and E. L. Fuller of date January 2, 1894, and a first mortgage of the Ithaca and Cayuga Heights Railway Company to the Ithaca Trust Company of date April 1, 1905, and a first mortgage of the Cayuga Lake Electric Railroad Company to Alfred E. Hand and E. L. Fuller of date January 1, 1894."

A further provision in the granting clause describes "all

leaseholds, leases, terms and parts of terms, rights under leases and contracts, etc., now held or hereafter acquired by said railway company for the purposes of said railways, branches or extensions or any part or portion thereof," but it does not specify in any manner any particular leasehold, nor does it in any way designate or describe, except by the general terms quoted, the lease to it of the Cayuga Heights property.

The "first mortgage of the Ithaca and Cayuga Heights Railway Company to the Ithaca Trust Company of date April 1, 1905," was the mortgage upon the property of that company hereinbefore mentioned, and pursuant to which bonds to the amount of \$40,000 were issued to Newman and Blood. Those bonds were guaranteed by the Ithaca Street Railway Company, both as to principal and interest, at the time of the issuance thereof.

This mortgage was duly satisfied and discharged of record on the 29th day of June, 1908, Newman and Blood, the holders of all the bonds secured by said mortgage, having surrendered and canceled the same and accepted in lieu thereof an equal amount of bonds secured by the first consolidated mortgage for \$750,000 of the Ithaca Street Railway Company hereinbefore described.

Subsequent to the resolution of May 21, 1908, the Ithaca Street Railway Company treated the Cayuga Heights line as its own property, as is shown by the following acts: It described the property as its own in the mortgage by the clause hereinbefore quoted; it took up and dismantled a portion of the line over a mile in length, leaving remaining the 4200 feet which is now in existence; it took a considerable quantity of rails from the line and placed them in its own track elsewhere in the city of Ithaca; it made reports to this Commission showing that it had merged the Ithaca and Cayuga Heights Railway Company, and also the Cayuga Lake Electric Railroad Company, another subsidiary line of which it owned the entire capital stock.

On December 8, 1908, its president addressed a communication to this Commission, saying:

Will say the exact names of the corporations consolidated into Ithaca Street Railway Company are as follows:

1. Cayuga Lake Electric Railroad Company.
2. Ithaca and Cayuga Heights Railway Company.
3. Ithaca Street Railway Company.

Other communications were addressed by officers or attorneys of the company to this Commission, stating in detail the alleged merger of the companies.

It should be here stated that the rental named in the lease of the Cayuga Heights property to the Ithaca Street Railway Company was an assumption to pay both principal and interest accruing from and after the 1st day of October, 1905, upon the bond issue of \$40,000, the bonds themselves having been guaranteed as above stated. The obligation to pay this rent ceased upon the cancellation of the bonds and discharge of the mortgage.

In the month of December, 1911, the trustee under the consolidated mortgage commenced an action to foreclose the same in the Supreme Court, and in that action the receivers were appointed by an order of the special term granted on the 6th day of January, 1912. The material portions of the order are as follows:

(a) *Ordered* that John W. Dwight and Roger B. Williams, jr., both of the State of New York, be and they hereby are appointed receiver of all the mortgaged premises and property mentioned and described in the complaint herein, as well as the property specifically mentioned in said mortgage and owned by the said defendant railway company at the time of the execution and delivery thereof, as well that thereafter acquired by said defendant railway company together with all the tolls, revenues, income, rents and profits of every kind, nature and description now due and unpaid or to become due pending this action with the usual powers and duties of receivers in such cases.

(b) Said receivers are hereby empowered to enter into and upon and take possession of all and singular the mortgaged property and premises of the defendant railway company and each and every part thereof, etc., and to have, hold and use the same, controlling, manag-

ing and operating by superintendents, managers, servants or other agents or attorneys the said railway and railways, railway route and routes and leaseholds and all other property, real and personal, of the said defendant railway company, with the appurtenances and conducting the business and operations thereof and exercising the franchises pertaining thereto, with power to make from time to time at the expense of the trust estate all repairs and replacements thereto and thereon as to the said receiver may seem proper and judicious and to collect and receive all tolls, income, rents, issues and profits of the said mortgaged property that are now accrued and unpaid, and as well those that may subsequently accrue.

(c) But nothing herein contained shall be construed as an affirmation, ratification or continuance of any contract of lease heretofore held or owned by said defendant railway company or of any other contract heretofore made by the said company and which the receiver may be entitled to terminate, unless the receivers shall expressly elect to make such affirmation, ratification or continuance, and pending the exercise of such election the receivers shall be liable only for the reasonable charges for use and occupation of any leasehold property for the period actually occupied; *and the receivers shall be entitled to six months time within which to exercise such election as to any contract or lease or otherwise which by its terms is to continue in effect for the period of six months or more.*

(d) That the said receiver be and they hereby are directed to demand, collect and receive all tolls, income, rents, dues and charges that may be now due and unpaid, or that may become due pending this receivership upon the said mortgaged property or any part thereof or of the business of said defendant railway company and to continue the business of said defendant railway company and to use and employ the said mortgaged property in said business of a railway company and the doing of each and every thing or things incidental to or growing out of or connected with the operation and maintenance of said railway and railway routes.

(e) That the said receiver be and he hereby are authorized and empowered to purchase all supplies, goods and materials that may be necessary for the transaction of the business of the said defendant railway company and the keeping in repair of the said mortgaged property and premises, and the carrying out of the provisions of this or any other order of the court and they are hereby authorized and directed to keep said property and premises insured against loss or damage by fire and in repair; to pay the taxes, assessments and water rates upon said premises, and to employ an agent or agents, superintendent or superintendents, managers, clerks, employees, necessary in their judgment and to pay the reasonable value of their services, and

to manage the said property and carry on its business, and exercise the franchises thereof, and make such replacements and payments as may be necessary to exercise the powers hereby conferred, and to conform to the provisions of this or any other order of the court made herein.

The receivers did not on the 5th day of July, 1912, at which time they ceased operations over the Cayuga Heights line, surrender to the lessor all the property described in the lease. They retained possession of the cars described therein, and have since been operating them over the line of the Ithaca company. They also at that time had in their possession as a part of the tracks of the last named company the rails which had been taken up from the Cayuga Heights line, and they have been and are now using them in the tracks. They did not make any effort to return this property to the lessor, or to relieve themselves from the care and custody of it, and on the contrary have been actively using the same in and about the transaction of their business of operating the road.

The foregoing is believed to be a summary of the material facts which have been presented for our consideration, and we are now ready to consider the serious questions involved in the case.

First: The receivers are temporary receivers of the property of the Ithaca Street Railway Company *pendente lite* in the foreclosure of a mortgage upon that property executed by the company. They are mere ministerial officers appointed to take possession of and preserve the property covered by the mortgage. They are mere custodians of it for the court. They are authorized by the court to operate the property, managing and controlling it under due supervision and direction of the court, for the benefit of those who may ultimately become entitled to the fund derived from its sale. These principles are well established, and are precisely those which are affirmed and relied upon by the receivers, and it is unnecessary to cite more than the following cases in support of the proposition enunciated:

Chicago National Bank v. Kansas City Bank, 136 U. S. 223; *Quincy M. & P. R. R. Co. v. Humphreys*, 145 U. S. 82; *Stokes v. Hoffman House*, 46 A. D. 120.

By the provisions of subdivision 7 of section 2 of the Public Service Commissions Law, as such receivers of a street railroad corporation they are for the time being a street railroad corporation as that term is used and defined in the Public Service Commissions Law, and are subject to the jurisdiction and supervision of this Commission and its control in the exercise of their powers as a street railroad corporation. It probably will not be questioned that in the conduct of their operations as a street railroad corporation they are subject to the exercise of all the powers conferred upon this Commission by sections 50 and 51 of the Public Service Commissions Law. It is to be assumed, and we think there can be no question the assumption is correct, that this Commission can order them to render service sufficient and adequate, under the powers conferred upon it by section 51. In other words, the whole scope and intent of the Public Service Commissions Law seems to us to place the receivers of a railroad in the precise position of the railroad itself, so far as regulation by the Commission is concerned. It of course may be true that certain acts which could be ordered to be performed by the owner of the road could not be performed by the receiver, owing to lack of funds, and also owing to the control that is to be exercised over him by the court.

The power of a chancery receiver to disaffirm an executory lease to the company of which he is receiver was bestowed long before the creation of any Public Service Commission or any statutory enactment regulating and supervising railroad corporations. The enactment of the Public Service Commissions Law did not take from railroad corporations, street railroad corporations, or common carriers, generally speaking, the powers which they theretofore possessed. On the contrary, it left them in full possession of

such powers, subject in the exercise thereof however to the control and direction of the Commission. Such corporations and their receivers have the power in the first instance to determine the extent and character of the service which they will render to the public. The exercise of that power is now subject to the control of the Commission, which can order additional service or different service in the manner and to the extent provided by law.

A broad and primary question presented in this case is whether a receiver of a street railroad corporation can, upon his mere volition, absolutely discontinue service required in the public interest without being subject to the control of this Commission in the exercise of his discretion.

The defense in this case is not based upon facts which would warrant the Commission in authorizing the discontinuance of service upon the Cayuga Heights line. No proof whatever has been made upon that subject, although some assertions have been made upon both sides as to the extent of the service rendered and the remunerativeness thereof. The question of fact, whether the discontinuance of the service was just and proper, has not been tried before us. The receivers have put themselves squarely upon the proposition that they had absolute power to discontinue the service without our consent, and that we had no jurisdiction to review their action. It must be pointed out that they are mere custodians of the property, appointed by the court to preserve it and to operate it in the public interest during the pendency of the action of foreclosure. It must again be pointed out that they are, by the very terms of the Public Service Commissions Law, a street railroad corporation, and as such subject to the powers of this Commission. It is the duty of the Commission to see that all street railroad properties under its supervision shall be operated in the interest of the public, that proper accommodations shall be afforded, and proper service given. This Commission notes, from the reports submitted to it, that tens of thousands of people

have been carried annually over the Cayuga Heights line; that service upon that line is convenient to large numbers, and probably necessary; and the question presented is whether, with the law as it stands, a mere custodian of the property can discontinue such service without assigning a reason therefor other than his own discretion. These receivers have received no order or direction from the court to discontinue the service. So far as appears, they have made no application to the court, but have simply exercised the legal right which is inherent in the office which they hold as custodians of the property.

Considering the number of leased lines of railroad within this State, the frequency of receiverships, the manifest inconvenience to the public which may be created by entrusting the power of discontinuing service to mere custodians of property without any regulation or supervision whatsoever, considering the intent of the Legislature to subject all operations of railroad corporations as to the character and extent of service to the Commission, we are convinced that the proper construction of the Public Service Commission Law is that the right of the receiver to discontinue service upon leasehold property described in the mortgage and committed to his care by the order of the court must be exercised subject to the power of this Commission. It may be that upon proper application the receivers could make a case in which they should be allowed to exercise the right. It may be that upon a showing as to the facts this Commission would without hesitation give permission to the receivers to discontinue operations upon the Cayuga Heights line. Until such a showing is made, upon proper application, it is the duty of the Commission, if it has the power so to do, to require the resumption of service by the receivers. The discontinuance of service by them makes it impossible for any service to be rendered upon the line. They retain possession of the rolling stock. They have control of all the motive power. The company of which they are receivers is

the owner of all the capital stock of the Ithaca and Cayuga Heights company and is insolvent. There is nothing upon which this Commission can act to procure service upon this line except the receivers; and if the receivers are not subject to our jurisdiction in this matter, no receiver in like case is subject; and it would be possible in this and many other cases to absolutely discontinue operations upon leased lines without the slightest redress upon the part of the public.

Second: The discussion has thus far proceeded upon the ground that the interest of the Ithaca Street Railway Company in the Cayuga Heights line is that of a lessee. We are confronted, however, by the fact that it has for a period of at least four years asserted itself to be the owner of that property; that it has described the identical property in the mortgage which is being foreclosed as being owned by it, and that it has taken certain official action which, if it had been in full compliance with the statute, would have made it the owner of the property. It was the owner of the entire capital stock of the Ithaca and Cayuga Heights company.

Section 15 of the Stock Corporation Law, during all times mentioned herein, as well as now, was and is as follows:

Any domestic stock corporation lawfully owning all the stock of any other stock corporation, organized for or engaged in business similar or incidental to that of the possessor corporation, may file in the office of the Secretary of State under its common seal a certificate of such ownership and of the resolution of its board of directors to merge such other corporation, and thereupon it shall acquire and become and be possessed of all the estate, property, rights, privileges and franchises of such other corporation and they shall vest in and be held and enjoyed by it as fully and entirely and without change or diminution as the same were before held and enjoyed by such other corporation and be managed and controlled by the board of directors of such possessor corporation and in its name; but without prejudice to all liabilities of such other corporation or the rights of any creditors thereof.

It was within the power of the board of directors of the Ithaca Street Railway Company at any time to become the absolute owner of the Cayuga Heights line by complying with

the provisions of this section. The essential fact requisite to becoming such owner was that the board of directors should resolve to merge the Ithaca and Cayuga Heights Railway Company. The filing of the certificate in the office of the Secretary of State, together with the copy of the resolution, is merely for the purpose of preserving evidence which may be known to all men of the action of the board of directors. It may be that the title to the property does not pass to the corporation owning the stock until such certificate and resolution are filed; but it remains true that the purpose of filing is merely to preserve evidence of the principal fact.

It is clear that it was the desire of the board of directors of the Ithaca Street Railway Company to vest in some manner the title of the property of the Cayuga Heights line, and of the Cayuga Lake Electric line, in their company. It is equally clear that they had the power so to do. By the resolution of May, 1907, they evinced this desire beyond any question. In the resolution of May 21, 1908, they recited that the officers of the corporation, in pursuance of certain resolutions, did execute the necessary papers in order to merge the properties. There is no proof before us that the recitals in this resolution are technically correct, and we may assume that they are not; but a resolution was adopted "that the board of directors hereby ratify all acts of said officers in executing the necessary papers to merge the said properties, and hereby ratify a merger of all the said properties". This, so far as the action of the board of directors was concerned, although informally worded and rather crude, must fairly be construed to be the action of the board constituting the merger of the properties. It may or may not effectuate that end. It is true that we must assume no certificate of ownership of the stock and no resolution of merger were ever filed with the Secretary of State; but it is a fair question for consideration whether or not, after the passage

of this resolution, it is possible for any person to deny the merger except the State itself. The principle laid down in *Black v. Ellis*, 129 A. D. 140, may fairly be invoked in support of this contention. We do not undertake to say, nor is it necessary that we should so undertake, that the contention would be upheld by the courts. What we do say is that the board of directors of the corporation evidently believed that it had effected a merger, as is evidenced by its resolution, and as is further evidenced by inserting in the mortgage itself a description of this identical property as property of the company; and that such being the case, it does not lie within the power of a mere custodian of the property to adjudicate and determine conclusively as against the entire world that the merger was not effected. That question is for a higher tribunal than a mere bailiff of property. It should be submitted to the court in whose custody the property is, or some other proper tribunal.

It should be pointed out that the complaint in the case describes the Cayuga Heights line as property of the corporation, by copying into such complaint the exact description contained within the mortgage. The complaint further asks for a decree of foreclosure and sale of this identical property—not of the leasehold interest, but of the property itself. The trustee is thereby claiming the property to be the property of the corporation. The court has appointed the receivers, receivers of this property as the property of the corporation; and it would seem to be extraordinary that the mere custodian appointed by the court to transact and manage the property during the process of foreclosure should have the power to say under all of these circumstances that the property is not the property of the corporation itself, but that the corporation has a mere leasehold interest therein. In view of the character of this property, the interest of the public that it should be operated for the convenience and necessities of the public, we are unable to persuade ourselves that under all of the foregoing circumstances the extra-

dinary power is conferred upon these receivers which they now claim.

Third: There is another reason which may fairly be urged against the position taken by the receivers. Under the general principle of law, such receivers have a reasonable time within which to elect whether or not they will proceed under the terms of such a lease as the one upon which they rely. The court appointing them of course has the power to determine what is a reasonable time within which to exercise such election, and by the very order of appointment has fixed a period of six months, which period expired on the 6th day of July, 1912. If the receivers elected to not proceed under the lease, it became their duty at once to surrender all the property described in the lease to the lessor. They could not disaffirm the lease and retain and use the property. The latter course is inconsistent with the disaffirmance.

In this case the receivers claim to have elected on the 5th day of July not to proceed under the lease. They retained, however, in their possession the rolling stock and rails above mentioned. The transaction which occurred subsequently, by which they claim to have leased this property from one of the directors of the Ithaca and Cayuga Heights Railway Company long after these proceedings were instituted, requires no discussion. Clearly this transaction was ineffectual and void for the purposes of this case.

In view of the foregoing considerations, the Commission is of opinion that an order should be entered requiring the receivers to resume operations upon the Cayuga Heights line. The terms of such order need not be discussed here.

In the Matter of the Complaint of the BOARD OF TRUSTEES OF THE VILLAGE OF LaSALLE *against* INTERNATIONAL RAILWAY COMPANY as to tickets for transportation between LaSalle and Niagara Falls.

1. While expressly disclaiming to give an exact definition of a "commutation ticket," it is the opinion of the Commission that a strip of tickets attached together and sold in a book of twenty for one dollar, where the straight fare between the points named in the ticket is ten cents one way, which said tickets are transferable, not limited as to time, and usable individually without reference to the cover of the book, can not be called a commutation ticket. The idea of a commutation ticket implies the use of the same by the holder thereof upon each day in the week or month, or at least upon each working day thereof, and that it shall be used for a return as well as an initial trip. The word "commutation" also implies a sale of the ticket at less than the regular straight fare between the points named therein. A strict interpretation of the word "commutation" as used in the parlance of transportation at the present time would limit the use of the ticket to one person and that it should not be transferable, that it should be used within a limited time, and at the end of that limited time those rides which have not been used shall be forfeited.

By the terms of subdivision 3 of section 33 of the Public Service Commissions Law, a distinction is shown between various forms of reduced rate tickets, and they are described as mileage, excursion, school or family commutation, commutation passenger tickets, half fare tickets for the transportation of children under twelve years of age, or any other form of reduced rate passenger tickets, or joint interchangeable mileage tickets. This would seem to indicate that a commutation passenger ticket was not to be classed with mileage or excursion, school or family tickets, but implied something different.

The characteristics which differentiate commutation tickets from the other forms named are those which have been generally indicated above. There may be others which are not enumerated, and the definition is not intended to be exact.

2. A street railway company under the terms of its franchise was authorized to charge between two points on its line a maximum fare of ten cents each way. The franchise further provided that commutation tickets shall be sold by the company and kept on sale at regular places for selling tickets in one only of the two points named to any point in

the other at the rate of twenty tickets for one dollar. On beginning operation the street railway company issued and put on sale a strip of transferable unlimited tickets as first above described, and after making use of this form of ticket for several years withdrew the ticket and substituted a ticket sold in books and limited in use to the person or persons whose names were inscribed in the book.

Held that the railway company was not precluded by the issuance of the first form of ticket from substituting in the place thereof another more in the form of a commutation ticket.

The form of the ticket to be issued under the circumstances prescribed.

Decided November 13, 1912.

George N. Tuttle for complainant.

Morris Cohn for respondent.

OLMSTED, *Commissioner*:

The complaint in this proceeding is dated March 8, 1912, and states that the respondent for the past ten or twelve years and ever since the road commenced operation had on sale for the benefit of the residents of the village of LaSalle et al., transportation tickets of the value of five cents each, which were sold at the rate of twenty tickets for \$1, for fares between the village of LaSalle and the city of Niagara Falls, N. Y., which tickets were transferable and capable of use by the holder thereof; that this form of ticket was issued pursuant to an agreement made and entered into between the Town of Niagara and the respondent for the purpose of carrying out the specific terms of the franchise originally granted by the Town of Niagara, which provides for a five-cent rate between the village of LaSalle and any point in the city of Niagara Falls. The complainants state that "within the last month the railway company has discontinued the use of the form of ticket referred to and is now issuing commutation books containing twenty tickets which are sold for \$1, but the tickets are not transferable and for that reason must be used by the person to whom the

book is issued". The complainants state that this works a great hardship upon the residents of the village of LaSalle, and ask that the Commission restore the form of ticket originally used.

The respondent denies that any form of ticket issued at the rate of twenty tickets for \$1 for fares between the village of LaSalle and the city of Niagara Falls, transferable and capable of use by the holder, was ever issued by it pursuant to agreement made and entered into between the Town of Niagara and respondent for the purpose of carrying out the specific terms of the franchise originally granted by the Town of Niagara, and denies that any such franchise provided for a five-cent rate between the village of LaSalle and any point in the city of Niagara Falls.

Respondent alleges that "respondent has issued and is now selling genuine commutation tickets, twenty tickets for \$1, good for transportation not only from LaSalle to Niagara Falls, but also good from Niagara Falls to LaSalle, and prays that the complaint be dismissed".

Upon the hearings had in this matter it was shown that on the 25th day of August, 1894, the highway commissioner of the Town of Niagara executed and delivered to the Buffalo and Niagara Falls Electric Railway (a predecessor of the respondent) a franchise or consent to construct, maintain, and operate a franchise of said railroad, etc., in the town of Niagara. Said franchise contained the following provision:

IX. A fare not exceeding five cents between any point in the town of Niagara and the State Park in the city of Niagara Falls each way shall be charged per passenger for working men and working women between the hours of six and seven o'clock in the morning and six and seven o'clock in the evening of each day, and not to exceed the same rate for school children going to and returning from school; and at all other times the fare per passenger between the points above named shall not exceed eight cents either way, or fifteen cents per round trip.

That thereafter, and on the 26th day of November, 1895, Frederick Brooks, as sole commissioner of highways of the

Town of Niagara, issued to said Buffalo and Niagara Falls Electric Railway a document in the nature of an extension and modification of said franchise, which recites the issuance of said first mentioned franchise of August 25, 1894, and continues, as follows:

Whereas, One of the terms and conditions stated in said consent was that said railroad should be completed and in operation by the first day of August, 1895; and

Whereas, Said railroad was not completed and in operation on said date, and said company has made application to the undersigned as sole Commissioner of Highways of said Town of Niagara to extend the time for the completion and putting in operation of said railroad for the term of three months from said first day of August, 1895;

Now therefore I, Frederick Brooks, sole Commissioner of Highways of said Town of Niagara, do hereby consent that the time for the completion and putting in operation of said railroad shall be extended for three months from the first day of August, 1895, upon the following terms and conditions, viz:

1. The rates of fare to be charged by said company from any point in the town of Niagara to the following points shall not exceed the sum stated, viz: To any point in the city of Buffalo, including transfer over the lines of the Buffalo Street Railroad system, thirty cents, and to any such point and return, forty-five cents; to any point within the corporate limits of the village of North Tonawanda upon the line of said company, fifteen cents, and to any such point and return twenty cents; to any point in the city of Niagara Falls, ten cents. Commutation tickets shall be sold by said company, and kept on sale at the regular places for selling tickets in the village of LaSalle, at the rate of twenty tickets to any point in the city of Niagara Falls for one dollar; all such tickets to be good for and include transfer over the lines owned or operated by the Niagara Falls and Suspension Bridge Railway Company to any point within the corporate limits of said city.

Said document of November 26, 1895, contains several other terms and conditions which are not material to the present question at issue, and closes with the following condition:

Said consent dated August 25, 1894, as a consent to construct, maintain, and operate a single or double track road, shall remain in all respects unchanged except as hereby modified.

It appears that this extension of time and modification of the original franchise was accepted by the Buffalo and Niagara Falls Electric Railway, and the road was completed and put in operation.

It further appears that at the time of the beginning of operation of the said railroad it issued and put on sale a form of ticket which was sold in a strip containing twenty tickets for the sum of \$1. These tickets were sold at different offices of the company, and were thereafter re-sold by firms and individuals at a number of places both in LaSalle and in the city of Niagara Falls.

This ticket in its latest form reads on the face thereof as follows:

International 5 Railway Co.
one fare between
LaSalle and Niagara Falls.

On the back thereof the following:

This ticket is only good between
LaSalle and Niagara Falls and will
not be received for a fare or any
part of a fare except between these
points.

These tickets were kept in use by the Buffalo and Niagara Falls Electric Railway and its successor the International Railway Company until some time in February, 1912, when they were withdrawn and a new form of ticket issued which is in the shape of a book of tickets, twenty in number, and sold for \$1 for the book. The outside cover of the book reads as follows:

International Railway Company
Citizens Commutation Ticket
On presentation of this ticket properly stamped with coupons attached, and bearing the same consecutive number as this cover.
M.....
is entitled to ride between LaSalle and Niagara Falls, N. Y.

in either direction as indicated on coupon subject to conditions of contract on inside of this cover.

No.....

G. H. DREYBUS,

Traffic Agent.

On the inside of the cover the reading is as follows:

CONDITIONS.

The coupons attached will be accepted for passage on BUFFALO & NIAGARA FALLS DIVISION, between points named on ticket, only when presented with original cover in which issued, by the original purchaser whose name appears on the outside front cover, and, in case this ticket is issued for family use, the names of such immediate members of family entitled to so use it, must be clearly written by company's authorized Agent on inside of back cover.

Coupons are non-transferable and not good for passage unless detached by conductor. Conductor must take up and return the cover of this book to Auditor's office when honoring the last coupon herein or when ticket has expired.

(See information required on inside back cover.)

The back page of the cover reads as follows:

Names of immediate members of family entitled to use this ticket.

.....
.....

The ticket in form reads as follows:

International 5 Railway Co.

one fare between

LaSalle and Niagara Falls

Not good if detached, or if presented for passage by any other person than original purchaser.

On the back of each ticket is printed the following:

This ticket is only good between
LaSalle and Niagara Falls and will
not be received for a fare or any
part of a fare except between these
points.

It was shown that it was the custom for the agent who sold the last named book of tickets to compel the purchaser thereof to place on the inside of the book cover the names of immediate members of the family entitled to use the ticket, and unless the ticket was presented by one of the persons whose names were there inscribed it was refused and a fare of ten cents collected. The other conditions named in the book and hereinbefore given were enforced by respondent's conductors.

The complainants urged upon the Commission that the transferable strip of tickets originally sold constituted the interpretation by the railway company of that clause in the agreement which provides that "Commutation tickets shall be sold by said company and kept on sale at the regular places for selling tickets in the village of LaSalle at the rate of twenty tickets to any point in the city of Niagara Falls for \$1"; and that the predecessor of respondent (and thereafter the respondent) by the issuance of this form of ticket has defined the term "Commutation ticket" and precluded itself (or its successors) from interpreting the words "Commutation ticket" in any other manner; and that by a usage of ten or twelve years a procedure in regard to such tickets has been established which can not now be departed from.

The respondent on the other hand claims that it is not so precluded, that the terms of the franchise and agreement oblige it only to issue commutation tickets, and that it is obliged by the terms of the franchise and the agreement only to issue a ticket which shall come under the definition of a commutation ticket. It claims that it is not bound by any previous action of its predecessor or itself, and claims that the strip ticket originally issued was not in any sense a commutation ticket.

After hearing the evidence in this matter the Commission made a resolution on the 8th of July, 1912, which reads as follows:

In the matter of the complaint of the Board of Trustees of LaSalle against the International Railway Company. (Case 2942.)

Resolved, That the International Railway Company be advised in the matter of the above entitled complaint that the Commission is of opinion

(1) That the fare between the village of LaSalle and the city of Niagara Falls should not be substantially changed from the rate maintained by the railway company since the opening of its road in 1895 to about February, 1912;

(2) That the substitution by the railway company of the so called family commutation book in its present form and with the restrictions now imposed upon its use for the strip coupon ticket is a substantial change in such fare which the Commission regards as unreasonable and as imposing a burden upon the inhabitants of LaSalle not justified in view of the practical interpretation which the company has given to its franchise during a period of upward of sixteen years;

(3) That the railway company should on or before July 22, 1912, submit to the Commission any plan which it may desire to suggest which will give to the residents of LaSalle substantially the fare heretofore enjoyed by them, and at the same time protect the company against the use of the same which it alleges is unjust and unwarranted.

The unjust and unwarranted use of the tickets referred to in the resolution was shown upon the hearing to be the use of said tickets by persons other than the residents of the village of LaSalle who tendered the same in part payment for through fare between the city of Tonawanda or the city of Buffalo and Niagara Falls.

The respondent claims that the commutation fare was by the terms of the franchise put in for the convenience and use of the residents of the village of LaSalle alone.

In response to the said resolution of the Commission the respondent on or about the 20th day of July, 1912, advised the Commission as follows:

To the Public Service Commission of the Second District of the State of New York:

In compliance with the resolution of the Public Service Commission of the Second District of the State of New York, a copy of which certified under date of July 11, 1912, has been received by this company,

International Railway Company herewith respectfully submits to said Commission the following plan, which will give to the residents of LaSalle substantially the fare hereinbefore enjoyed by them, and at the same time protect the company against the use of tickets in an unjust and unwarranted manner, viz:

The clear purpose of the provision contained in the instrument executed by the highway commissioner of the Town of Niagara in August, 1895, was to secure for the people residing in LaSalle a fare of five cents to Niagara Falls, where twenty commutation tickets were purchased at a time, and possibly, also, to secure, under like circumstances, to the *same people* a fare of five cents from Niagara Falls to LaSalle. Without conceding that the book of commutation tickets issued by the company since March 1, 1912, does not fairly meet all the requirements of that provision, but in order to meet the criticisms which have been aimed against the last named commutation tickets, and to meet the views of the Commission, the company is prepared, in lieu of any other commutation tickets, to issue and put on sale in the village of LaSalle only, a book of twenty commutation tickets for the price of one dollar (\$1), to consist of ten round-trip tickets from LaSalle to Niagara Falls contained in a cover, usable by anyone when presented with and attached to the original cover containing the same, subject to the provision that no such ticket or coupons shall be usable as a part of a fare between points beyond the limits of the ticket, and subject to the further limitations of use appearing in the form thereof, which will be as follows:

INTERNATIONAL RAILWAY COMPANY

Good for one continuous trip
Niagara Falls, N. Y.
to
LaSalle, N. Y.

This ticket and the annexed coupon are local tickets, good only between stations named, and will not be accepted as a part payment of any through fare or ride of a through passenger between any other points upon the lines of said Company.

**TO BE DETACHED BY CONDUCTOR
ONLY.**

VOID IF OTHERWISE DETACHED.

No.....

INTERNATIONAL RAILWAY COMPANY

Good for
One Continuous Trip

in opposite direction and between same points, in accordance with the terms of the accompanying ticket.

**TO BE DETACHED BY CONDUCTOR
ONLY.**

VOID IF OTHERWISE DETACHED.

No.....

If this form of commutation ticket meets with the approval of the Commission, a tariff therefor will be filed and the rate put in force and effect as soon as such new commutation tickets can be made ready.

The Commission is thus called upon to decide whether the ticket now offered to be placed on sale as stated in respondent's communication of July 20, 1912, is a sufficient and proper compliance with the terms of the franchise and agreement hereinbefore referred to.

The petitioners have rested their case on the interpretation which the Commission shall give to the clauses of the franchise and agreement hereinbefore set out. They have not complained that the rates named in said franchise and agreement, so far as they are charged by respondent, are unreasonable, but take the position that the terms of the franchise can be carried out only by the restoration of the strip of tickets originally put in use.

The Commission expressly disclaims here to give an exact definition of a commutation ticket. It is of the opinion, however, that the strip of tickets originally issued and first hereinbefore described can not be classed as a commutation ticket. We think that the idea of a commutation ticket implies the use of the same by the holder thereof upon each day in the week or month, or at least upon each working day thereof, and that it shall be used for a return as well as an initial trip. The word commutation also implies a sale of the ticket at less than the regular straight fare between the points named therein. A strict interpretation of the word commutation as used in the parlance of transportation at the present time would limit the use of the ticket to one person and that it should not be transferable. This is departed from by the ticket now proposed by the respondent to the extent that it may be used by any person holding the book and presenting the same to the conductor.

In the same manner and in the same parlance a commutation ticket implies the idea that a book entitling the holder to a certain number of rides shall be used within a limited

time, and at the end of that limited time those rides which have not been used are forfeited. This provision also is waived by the form of ticket now offered by respondent. It may be used at any time and by any number of persons provided they are together at the time when the book is presented.

By the terms of subdivision 3 of section 33 of the Public Service Commissions Law a distinction is shown between various forms of reduced rate tickets, and they are described as mileage, excursion, school or family commutation, commutation passenger tickets, half fare tickets for the transportation of children under twelve years of age, or any other form of reduced rate passenger tickets, or joint interchangeable mileage tickets.

This would seem to indicate that a commutation passenger ticket was not to be classed with mileage or excursion, school or family tickets, but implied something different.

We think that the characteristics which differentiate commutation tickets from the other forms named are those which have been generally indicated above. There may be others which are not here enumerated, and the definition is not intended to be exact.

The form of ticket now offered by the respondent renders it necessary that the journey shall be begun at LaSalle in order to get the benefit of the reduced rate. This would seem to be in accordance with the spirit of the original franchise and modification thereof which contemplated the convenience and necessities of the people of LaSalle, and contemplated further that the commutation tickets should be kept on sale *at the regular place for selling tickets in the village of LaSalle*; and if the provisions in the document of November 26, 1895, are to be construed by the light of section 9 of the original franchise, it will be noted that the five-cent fare was originally contemplated for working men and working women, to be used presumably in going to and from their business, between certain hours of the day.

It is apparent from construing the two provisions together that the hours for the use of the ticket were made unlimited in consideration of explicitly naming 10 cents as the straight fare between the village of LaSalle and the city of Niagara Falls, and providing that if the five-cent fare were made use of it should be only made use of by commutation riders. We think that the commutation riders in the sense that we have already described them will be amply accommodated by the form of ticket now proposed.

It was suggested and urged upon the hearing that these tickets should be sold in books of ten for 50 cents per book. This request might be a reasonable one provided the use of each book were limited to one person holding it and whose name was inscribed thereon. The present book may be used by any number of persons in a family who are traveling to work at the same time; and if the feature of daily use is considered, it is apparent that a book, even if used by one rider alone, would be used up in ten days. Under these circumstances it does not appear that the purchase of a book entails any undue outlay of cash. It is reasonable to suppose that a rider of any considerable degree of regularity would not object to investing \$1 every ten or twenty days.

In order that the exact form of ticket proposed by the respondent should be placed before the Commission, the respondent was asked to submit to the Commission a printed form of such ticket. It has done so in a letter addressed to the Commission under date of November 8, 1912, which is filed with the papers in the case.

While the form of ticket submitted may imply as a matter of law certain provisions as to its use, it is better that the ticket itself should contain plain statements which shall notify the purchaser just what his rights are in connection with it; and the order to be entered in this case should provide that the ticket should be printed in the exact form of the blank submitted in the letter of November 8, 1912, so far as the arrangement of ticket and its accompanying

coupon is concerned. That is to say, the ticket and coupon should be printed on one sheet, in order that the going coupon may be used if necessary a number of times without rendering void the annexed return ticket. The book should also have printed upon it conditions substantially as follows:

1. Each commutation ticket and coupon attached is (a) good for a single continuous trip between the points named thereon; (b) good until used when presented with original cover and *not detached*.

2. Tickets and coupons are good for the fare of the holder of the book and of others of his family or party on the same trip.

3. Tickets and coupons *are not good* and will not be accepted as part payment of any through fare between any other points upon the lines of the company.

4. No coupon or ticket will be accepted by the conductor when detached.

5. Conductors must take up and return the cover of this book to the auditor's office when honoring the last ticket herein.

It is the opinion of the Commission that a ticket in the form above detailed and containing the conditions above set forth will meet the objections raised by the complainants; and an order should be entered directing the respondent to discontinue, on or before the 15th day of December, 1912, its present form of ticket hereinbefore set forth, and to substitute therefor and place on sale at the regular place or places for selling tickets in the village of LaSalle a ticket in the exact form, so far as arrangement is concerned, submitted in the letter of respondent dated November 8, 1912, above referred to, which shall be sold in books of twenty tickets (that is to say, ten tickets and ten coupons) for \$1, and shall

have printed at some place upon the cover thereof the conditions substantially as hereinbefore set forth, and no others which in anywise conflict with the same.

The form of ticket adopted by the respondent should be submitted for the approval of the Commission on or before the 1st day of December, 1912. An order will be entered accordingly.

In the Matter of the Application of THE RED HOOK LIGHT
AND POWER COMPANY.

In this case, The Red Hook Light and Power Company applied to the Commission under section 68 of the Public Service Commissions Law for permission to construct an electric plant and a gas plant in the city of Hudson, and to exercise a certain franchise therefor granted by the common council and mayor of said City.

The application was denied upon the following grounds:

1. That another electrical and gas corporation was already giving electric and gas service to the city of Hudson.

2. That the service rendered by such other corporation had not been shown by the applicant to be not satisfactory to the public and of such a character that a competing company should be admitted into the city.

3. That the contention of the applicant that the other company did not have a franchise in said city was one which would not take into consideration that the existing company was in fact occupying the city, and if it were not there lawfully, the remedy lay with the courts and not with the Commission.

The opinion contains a review of the authorities upon the question of admitting a new gas corporation or electrical corporation into territory already occupied by another company rendering satisfactory service.

Decided November 14, 1912.

A. W. Bailey and John N. Carlisle for the applicant.

Randall J. LeBoeuf for Albany Southern Railroad Company.

STEVENS, *Chairman*:

On the 5th day of June, 1911, by a resolution duly passed by the common council of the City of Hudson, and approved by the mayor of said City on June 6, 1911, a franchise was granted to The Red Hook Light and Power Company, the applicant, for the use of the streets, avenues, public places,

and parks in the city of Hudson for the purpose of conducting and distributing electricity and gas for public and private use. The petitioner asked for permission and approval to exercise such franchise, and also for permission and approval to begin the construction of electric and gas plants in said city.

Numerous hearings have been had upon said application and a large amount of evidence has been taken in support of and in opposition thereto.

The City of Hudson, at the present time, is supplied with both gas and electricity by the Albany Southern Railroad Company. This company opposed the application of the Red Hook company.

The applicant raises the question that the Albany Southern Railroad Company is without legal capacity to conduct a gas or electric light business and therefore has no right to appear before this Commission in opposition to the application.

The applicant also contends that the formation of the Hudson Light and Power Company by consolidation of the Hudson Gas Company with the Hudson Electric Light Company, the Hudson Light and Power Company being the predecessor in interest of the Albany Southern Railroad Company, is of doubtful validity, or if valid, gave no rights to the resulting company to do an electric lighting business in the streets of Hudson or a gas business subsequent to February 23, 1903.

The applicant further contends that the Citizens' Electric Light and Power Company, which was organized March 29, 1894, became defunct as a matter of fact and from force of law, and that its attempt at merger with the Hudson Light and Power Company passed no rights to the latter company.

An elaborate brief has been submitted upon the foregoing questions, and they have also been discussed by the counsel for the Albany Southern Railroad Company.

It is unnecessary to review in detail the various positions taken by counsel upon either side. It is undisputed that the Albany Southern Railroad Company is in fact supplying the city of Hudson with gas and electricity under a claim of right so to do. It has a large investment for both of these purposes within the city. It should therefore be treated by this Commission as an electrical and gas corporation *de facto*, and as such it has been treated ever since its organization. Being in occupation of the territory under claim of right, the Commission should treat it as a corporation *de facto*, and has no judicial power to determine it to be otherwise. If it is occupying the city of Hudson unlawfully for these purposes, the remedy lies in the courts and not with the Commission. The Commission does not, for these reasons, attempt to review or pass upon the elaborate questions raised as to the legal effects of the various transactions which have been brought to its attention.

The proceeding is not to oust the railroad company, but to admit the applicant into the territory; and the real question before the Commission is what considerations are to prevail with it upon this question only.

Considerable effort was made upon the part of the applicant to show that the service of the Albany Southern Railroad Company, both gas and electric, was not-satisfactory to the public and was of such character that a competing company should be admitted into the city of Hudson. The evidence submitted in this behalf was insufficient to establish the point contended for, and the various failures, omissions, and imperfections in service shown to have existed were, generally speaking, nothing more than can be found at times in the service of any company. Whatever defect was shown to exist in the service was something which could be easily remedied by the exercise of the powers of this Commission. It must be found as a fact that the gas and electric service afforded by the Albany Southern Railroad

Company is of such a character as not to warrant the admission of a competing corporation into that city.

The remaining proposition urged by the applicant is that it is ready to afford rates for service somewhat less than those which at the present time are being charged by the Albany Southern. This contention calls for a full presentation of the position uniformly taken by this Commission since its organization upon questions of this character. In the application of the *Lockport Light, Heat and Power Company*, decided in 1907 (1 P. S. C., 2nd D., 12), the Commission said:

A business which supplies to a community a public utility like gas, or electricity for light or power, is one in which free and full competition between two companies engaged in the same business can not be expected to prevail permanently. Experience has, we think, amply demonstrated the fact that when there is more than one such company in a municipality engaged in the same business, while active competition may prevail for a more or less brief period, the companies generally find it to their interest to reach an understanding either as to prices or division of territory, and in the great majority of cases the two companies either become one or the control of both passes into the hands of the same parties. It can doubtless be demonstrated beyond any possibility of successful contradiction that better service and fairer prices in furnishing such public utilities to a community can, as a general rule, be given by one corporation than by several and that this can be done with the use of less capital. The existence of more than one corporation furnishing the same public utility leads, for a time at least, to duplicate developments, to the building of plants which are not needed to serve the community, to the duplication of unsightly and expensive pole lines and distributing service, to costly and unnecessary tearing up and destruction of pavements, to administrative expenses greatly in excess of those which a single company would have to meet, and to increased leakage of gas or electric current. Undoubtedly municipalities have many times enjoyed periods of better service and lower prices by reason of temporary competition prevailing between two or more companies in the same field. After the almost inevitable consolidation, understanding, or division of territory, however, the service often becomes poor, and prices are raised in an effort to make the city and its inhabitants bear the burden involved in paying returns on the unnecessary capital invested in the duplicated plants. It is our belief that the provisions of the Public Service Commissions Law show a full appreciation of these facts by the Legislature of the State.

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In the matter of the *Niagara Falls Lighting Company*, decided July 1, 1909 (2 P. S. C., 2nd D., 116), the Commission said:

The policy of this Commission in cases where one lighting company seeks to enter the field already occupied by another requires that the applicant shall show that the company already serving the community is not doing so adequately and efficiently, and that its failures are such that they can not well be corrected by the exercise of the regulative powers of the Commission. Good service may now be obtained at reasonable prices in less expensive ways than by unnecessary duplication of plants, and the public interest does not demand that the capital invested in good faith in the public service should be destroyed or impaired without good reasons to be shown affirmatively.

In the same case, the Commission said that in its opinion reasonable rates to consumers can be obtained through the exercise of the powers of the Commission with greater advantage to the public than by attempting to regulate such service through competition with all of its attendant disadvantages.

In the case of the application of *Buffalo, Rochester and Eastern Railroad Company* (1 P. S. C., 2nd D., 543), this Commission said:

The history of the past fifty years is full of warnings and replete with experiences which the deliberate judgment of the law-making body of the State, reinforced by public sentiment, has sought to avert. The evil is the unnecessary duplication of public utilities. So long as the State was inadequately or insufficiently supplied with those facilities, its policy was to encourage their growth and development, and the greatest latitude was allowed to those desiring to embark upon enterprises of this character to invest their money and engage in the service of the public. As such facilities became more and more numerous, it was found that they were to a large extent in the nature of essential monopolies; that the unnecessary duplication of railroads, the unnecessary duplication of gas plants and electric plants, caused first the waste of a large amount of fixed capital; that the competition between too great a number of corporations of like character serving the same public entailed rate wars which resulted disastrously to the corporations concerned without any real or substantial gain to the public; that such rate wars inevitably resulted in consolidation or pooling; that the public was required ultimately to pay the bills of all such disastrous experiments; and that during the period of competition service deteriorated and the public thereby suffered.

The same principles have been recognized by other commissions. In the application of *LaCrosse Gas and Electric Company* (2nd Wis. R. C. R. 3), the Wisconsin commission says:

Duplication of such plants is a waste of capital, whenever the services can be adequately furnished by one plant only. It necessarily means that interest and maintenance must be earned on a much greater, if not twice as great, investment and that the actual cost of operation is likely to be relatively higher. Competition in this service therefore usually means a bitter struggle and low rates, until one of the contestants is forced out of the field, when the rates are raised to the old level if not above it, or to a combination or understanding of some sort between them which also ultimately results in higher rates. In this way it often happens that the means which were thought to be the preventative of onerous conditions become the very agents through which such conditions are imposed. In fact, active and continuous competition between public utility corporations furnishing the same service to the same locality seems to be out of the question. This has been shown by experience. Such competition is also contrary to the very nature of things. Two distinct and separate corporations are not likely to remain separate very long after it becomes clear that the services rendered by both can be more cheaply and more effectively furnished by only one of them.

In the Milwaukee case, decided by the same commission on August 20, 1912, it is said:

That competition in the very nature of things can not be a proper regulator of rates and other conditions in the public utility field, would seem to be too well understood for discussion. As a real competition in this field means duplications of plants, which duplications, when once put in, are for the most part useless for any purpose other than that for which they were intended, and which duplication, unlike current capital, can not be withdrawn from the service and used for other purposes. It also means excessive outlays for fixed and operating expenses. Again, it stands for unnecessary tearing up and occupation of already overcrowded streets and alleys, the possible duplication of services on customers' premises, and for many other inconveniences and costs.

As early as 1904, the Massachusetts Gas and Electric Light Commission, in the Haverhill case, said:

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Experience shows that the exploitation of a new company in a territory already occupied does not necessarily depend for its financial success upon the sale of electricity to the city and its citizens. That is by no means the only source of profit to such company. It has been repeatedly demonstrated that the profits of a new concern do not so much depend upon its dealings with the public as upon the relation which it may be able to establish with the company first in the field.

If the request of the new company be granted, it may naturally be expected that for a time both city and commercial lighting will be offered by both companies at considerably less than present rates, but such competition, under the conditions in this case, is sure to be expensive, even though for a time apparently economical or profitable. We may confidently expect, first losses, then profits: losses in the conduct of the business and the struggle for a control of the situation; profits in the later union or consolidation; losses for a time in the supply of electricity, to be converted later into new capitalization as a perpetual and irremedial burden of the public. The temporary advantage to a portion of the public is reasonably sure to be followed by an undue burden upon the public as a whole, through the larger capital demanding a return, much of it representing unnecessary duplication of properties as well as losses.

It is needless to multiply quotations upon this point. All of the language hereinbefore cited represents the well settled convictions of all those who have carefully studied the matter.

This Commission sees no reason for departing from the rule it has heretofore followed, and which in its judgment experience has abundantly justified.

The application should be denied.

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In the Matter of the Complaint of FULTON LIGHT, HEAT AND POWER COMPANY v. OSWEGO RIVER POWER TRANSMISSION COMPANY. Order to show cause why respondent should not be compelled to discontinue service of electricity in the city of Fulton.

A permit issued by the Superintendent of Public Works granting permission to set poles upon the berme bank of the canal and string wires thereon is a franchise which can not be lawfully exercised without first having obtained the permission and approval of this Commission, under section 68 of the Public Service Commissions Law.

Where such a franchise was exercised by an electrical corporation without first having made application to the Commission under section 68, and where it appears that such action was taken in good faith and in the belief that the corporation was within its legal rights,

Held that no action of this Commission should be taken against such corporation under section 74 of the Public Service Commissions Law until a reasonable time has been given within which to make application to the Commission for permission and authority under section 68 to exercise such franchise.

Decided December 3, 1912.

Gannon, Spencer & Michell (by Mr. Gannon) for complainant.

E. M. White for respondent.

OLMSTED, *Commissioner*:

On or about the 9th day of March, 1911, the Oswego River Power Transmission Company obtained from the City of Fulton a franchise to distribute within the city of Fulton, under certain conditions, electricity for light, heat, power, and other purposes, and to erect and maintain in the streets, etc., of the city of Fulton the necessary poles and other structures for that purpose.

Thereafter the Oswego River Power Transmission Company made application to this Commission for permission to exercise said franchise, which application was denied by an order of this Commission made on the 9th day of April, 1912.

On or about the 16th day of November, 1910, the Oswego River Power Transmission Company obtained from the Superintendent of Public Works of the State of New York a permit which is in language as follows:

STATE OF NEW YORK,
SUPERINTENDENT OF PUBLIC WORKS,
ALBANY, November 16, 1910.

Whereas, The Oswego River Power Transmission Company, a corporation duly formed and organized under and by virtue of the laws of this State, and having an office for the transaction of business in the city of Syracuse, N. Y., has made application for permission —

1. To construct, maintain, and operate an electric transmission line upon state land within the limits of Barge Canal Contract No. 45 at Baldwinsville; and

2. To construct, maintain, and operate an electric transmission line upon state land on the berme side of the Oswego canal near Fulton, within the limits of Contract No. 10, Barge Canal, for the purpose of reaching the plant of the Victoria Paper Mills Company; and has filed maps, plans, and profile showing the routes proposed to be followed by said transmission lines, and the location of the proposed poles or supports. Therefore

Permission is hereby granted to said Oswego River Power Transmission Company to construct, maintain, and operate, at its own cost and expense, an electric transmission line upon state land within the limits of Barge Canal Contract No. 45 at Baldwinsville, and an electric transmission line upon state land on the berme side of the Oswego canal near Fulton, within the limits of Barge Canal Contract No. 10, as referred to and described above, upon the following conditions and restrictions:

First: This permit shall not be assigned or transferred without the written consent of the Superintendent of Public Works.

Second: No work shall be commenced under this permit until such time as an inspector or inspectors to be appointed by the Superintendent of Public Works shall be present; and in case of any violation of this provision this permit is revoked and shall be without force or effect.

Third: All work authorized by this permit shall be done in accordance with the map, plans, and profile now on file in this office, and in accordance with the following specifications and directions:

(1) Every part of the transmission circuit near Baldwinville, including guards and supports, shall be at least forty feet from the water in the canal.

(2) The span crossing the canal shall be supported by well designed, substantial steel towers which shall be of sufficient height to prevent a broken end of a conductor from fouling the canal.

(3) All parts of both transmission lines shall be of first-class construction, of a design to be approved by the State Engineer and Surveyor and Superintendent of Public Works, and shall be maintained in a first-class, orderly manner as may be approved by the Superintendent of Public Works.

(4) Means shall be provided on each tower supporting the canal crossing so that a falling conductor will automatically shut off the current.

Fourth: In consideration of the privileges herein granted, the said Oswego River Power Transmission Company shall pay to the People of the State of New York, through the Superintendent of Public Works, an annual rental of one dollar during the period during which this permit remains in force for each pole or tower erected under the authority of this permit, such rental to be paid by said company in advance on the first day of January in each and every year during the time this permit remains in force.

Fifth: All work authorized by this permit shall be done under the supervision of the Superintendent of Public Works or an inspector or inspectors to be appointed by him, and the salary of such inspector or inspectors, together with all necessary expenses of such inspection, shall be paid by said Oswego River Power Transmission Company; and the work shall be done at such times as the Superintendent of Public Works shall direct and so as not to interfere with the free and perfect use of the canals or endanger the lives or property of those engaged in repairing, navigating, or operating the same; and so as not to interfere with the progress of any canal construction or repair work.

Sixth: As a further consideration for the granting of the privileges herein contained, the Superintendent of Public Works reserves the right at any time to attach to all poles or towers erected under this permit, message transmission wires, with the necessary crossarms and fixtures, for the use of the department.

Seventh: Said Oswego River Power Transmission Company shall be deemed and held liable for and shall pay any and all loss or damage that may occur or arise either to the State or to individuals in consequence of the construction, maintenance, operation, or use of said transmission lines or either of them or any part thereof.

Eighth: The Superintendent of Public Works reserves the right at any time to revoke and annul this permit and cause said Oswego River Power Transmission Company to remove said transmission lines or either of them from off state land at its own cost and expense, and such work of removal shall be completed within six months from the receipt of notice from the Superintendent of Public Works to remove the same; also the right on the part of the State of reentry and re-occupancy of such lands covered by this permit as the free and perfect use of said canal or land at any future time may require, or as may be necessary for making any repairs, improvements, or alterations in the same.

In testimony whereof I have hereunto set my hand and affixed the official seal of said office the day and year first above written.

[SEAL]

F. C. STEVENS,
Superintendent of Public Works.

Between December, 1910, and February, 1911, the Oswego River Power Transmission Company constructed a transmission line along the berme bank of the Oswego canal, under and by virtue of the permit from the Superintendent of Public Works hereinbefore set forth, and by virtue thereof delivered and is now delivering power to the Victoria Paper Mills located within the city limits of the city of Fulton. In constructing said line the wires upon which the current is carried cross two highways, known as Shaw street and North First street, which are streets in the city of Fulton running easterly and westerly and crossing said canal by means of bridges over the same. The construction across said highways consists in carrying the wires over same, which are at least thirty-five feet above the traveled portion of the highway and strung from poles located wholly upon the land within the blue lines so called and outside of the street boundaries, said poles being erected within two or three feet from the adjacent prism of the canal.

This proceeding is brought by the Fulton Light, Heat and Power Company, which has at the present time a plant and distribution system in the city of Fulton, and is now supplying said City with electricity for light, heat, and power purposes.

The complainant alleges that the respondent has no right under the Public Service Commissions Law to furnish current to the Victoria Paper Mills, and further alleges that it is furnishing power without right so to do to the North End Paper Mill.

The respondent reaches the North End Paper Mill by means of a transmission line running through the town of Volney which adjoins the city of Fulton. This line is constructed on a private right of way, crossing the city line in that manner and continuing on a private right of way to the plant of the North End Paper Mill. It is entirely independent of the line on the berme bank of the canal and crosses no streets or public highways in the city of Fulton.

On the hearing had herein on the 27th day of May, 1912, the complainant made no reference to the service which the respondent is rendering to the North End Paper Mill, but asserted that the service rendered to the Victoria Paper Mill was being rendered contrary to the provisions of the Public Service Commissions Law, and asked that this Commission institute judicial proceedings pursuant to section 74 of that law to enjoin and prevent the respondent from doing business or transmitting and furnishing electricity or electric current in the said city of Fulton, and to require respondent to remove its poles, wires, and electrical construction from said city, and for such other and further relief as might be proper. The reasons urged by the complainant for such action were:

1st. That the permit obtained by the respondent from the Superintendent of Public Works hereinbefore set forth was illegally granted, and that the Superintendent of Public Works had no authority to issue to respondent any permit of that nature.

2nd. That if the Superintendent of Public Works had authority to issue such a permit the same was a franchise, and could not be exercised without the permission of this Commission duly given under the provisions of section 68 of the Public Service Commissions Law.

3rd. That the transmission line crossed two streets in the city of Fulton, and that the respondent was inhibited from crossing said streets by virtue of the decision of this Commission denying it the right to exercise the franchise obtained by it from the City of Fulton on the 9th day of March, 1911, hereinbefore referred to.

No testimony was taken on the hearing, but the case was submitted on facts agreed upon and maps furnished by the counsel for the respective parties to the proceedings.

The questions involved are largely questions of law.

The Commission has submitted the facts in the case to its counsel, together with the briefs of the opposing counsel in the proceeding, and after consideration of all the circumstances is of the opinion that the permit issued to the respondent by the Superintendent of Public Works on the 16th day of November, 1910, is a valid permit. The Superintendent was not required to give his consent, and if he had discretion in the matter his consent becomes a franchise under the meaning of section 68 of the Public Service Commissions Law. A franchise has been defined by the United States Supreme Court as a special privilege conferred by the Government upon an individual or corporation which does not belong to the citizens of the country generally by common right. *Augusta Bank v. Earle*, 13 Peters U. S. 519, 595.

The Superintendent of Public Works was directly authorized to issue this permit, in his discretion, by section 48, subdivision 3, of the Canal Law. It was claimed on the hearing that this provision of the law referred only to electric towage or experiments looking thereto, but the administrative construction of the same has been to the contrary. *New Haven Railroad v. Interstate Commerce Commission*, 200 U. S. 361, 401, 402. *Matter of W. S. A. & P. R. R. Co.*, 115 N. Y. 442-447. It appears also that there were two permits granted to the complainant in this case prior to the one under consideration here which are precisely similar to it in character. It has not been shown to the satisfaction of the Commission that the permit of the Superintendent of Public Works is an invalid instrument, and it is assumed that under and by virtue of it the respondent has full authority, so far as the Department of Public Works is concerned, to construct its line along the berme bank of the canal.

The Commission is also of the opinion that the authority of the City of Fulton was not required for the purpose of crossing the highways known as Shaw street and North First street.

In *Niagara, Lockport & Ontario Power Company v. Bridges*, 131 A. D. 921, the Appellate Division held that permission to cross a highway at substantially right angles, with a transmission line suspended on poles set in a private right of way, none of the poles being within the highway, could not be withheld by the local authorities having charge of the highway, and that their right was confined to the police power and duty to see to it that the crossing was safe.

This case was tried in the first instance before Justice Benton, and in his opinion rendered on the decision of the case the learned Justice said: "I conclude under the evidence in this case that plaintiff has carefully constructed its lines with due regard to the safety of the public, that they are upon their own property, and such use of its own property is no encroachment upon nor obstruction of the highway; that it is not a nuisance affecting the rights of the traveling public; that it is duly incorporated and is within its corporate powers in the use of its transmission line throughout the town of Perinton; and that it is not required by law to obtain the consent of the Town Board as prerequisite to stringing its wires across the highway therein."

The decision of the Trial Court was unanimously affirmed by the Appellate Division.

In the case before us here, the poles are not set upon the property of the respondent, but they are set on property upon which respondent has a right to set them under the terms of its permit.

Inasmuch as the City of Fulton under this decision would have no right to prevent respondent from stringing its wires across the highway other than to see that the safety of the public is conserved, it would appear that the decision of this Commission either approving or disapproving of a franchise

given by the City of Fulton in the matter would have no bearing on the question presented here. Besides that, it appears that the City of Fulton, so far as it is concerned, has given permission to the respondent to cross the streets and highways in question.

This brings the consideration of the matter to the second reason urged by the complainant in invoking the action of the Commission under section 74 of the Public Service Commissions Law, namely, that the permit of the Superintendent of Public Works is a franchise, and can not be exercised without the permission of this Commission duly given under the provisions of section 68. In this contention we believe the complainant is right. Section 68 reads in part:

No gas corporation or electrical corporation shall begin construction of a gas plant or electric plant without first having obtained the permission and approval of the commission of each district within which any part of the work of construction is to be performed. No such corporation shall exercise any right or privilege under any franchise hereafter granted or under any franchise heretofore granted but not heretofore actually exercised, or the exercise of which shall have been suspended for more than one year, without first having obtained the permission and approval of the proper commission.

We have already stated that in our opinion the permit hereinbefore fully set forth is a franchise. It confers a right to put up poles and string wires upon and along one of the great highways of the State, and it comes squarely within the definition of a franchise as laid down in *Augusta Bank v. Earle* above cited. The provisions of the Public Service Commissions Law are clear, and the treatment of such a franchise by the Commission can be in no wise different from the treatment of an ordinary franchise granted by a town superintendent of highways to go along an ordinary highway. This permit or franchise was not exercised before July 1, 1907, and the Oswego River Power Transmission Company should have come to the Commission under section 68, asking permission to exercise it before it did exercise it.

It seems to the Commission that the respondent has brought itself under the provisions of section 74, but inasmuch as it appears that it has done so under the belief that it was proceeding within its legal rights, we do not think that the proceedings contemplated by section 74 ought immediately to be begun, but that the order in this case should provide that unless the respondent shall on or before the 1st day of January, 1913, bring before the Commission a petition under section 68 asking for permission to exercise the franchise in question, the counsel of the Commission should be directed to commence an action or a proceeding in the Supreme Court of the State of New York in the name of the Commission for the purpose of having the violations of section 68 prevented, either by mandamus or injunction. If the respondent shall bring a petition under section 68 before the Commission, the proceedings thereunder will of course be the same as those usually adopted in similar cases.

The complainant in this proceeding asks the Commission to take action regarding the service rendered by the respondent to the North End Paper Mill, but, as has been stated, little if any reference was made to this service either on the hearing or in the briefs presented by respective counsel. The questions which can be raised regarding the service to the North End Paper Mill are distinct and different from the questions raised as to the service to the Victoria mills, and if an adjudication thereon is asked from the Commission, it is expected that respective counsel will furnish the Commission with briefs on the points of law and upon the interpretation of section 68 raised by the facts disclosed. There is no dispute upon the facts, and they are all incorporated at the present time in the record. The Commission has communicated with the attorney for the complainant, who has advised the Commission by telegram, under date of December 3rd, that complainant is willing to leave out of consideration of the case at the present time service to the North End Paper Mill and to take a decision at this time on the Victoria

Paper Mills service only. The complainant should not be foreclosed, however, from pressing its complaint as to the North End Paper Mill service if it so desires, and to that end the order entered should postpone this part of the case for such action as complainant may advise it desires to take.

In the Matter of the Application of TOMPKINS C. DELAVAN and others for an order to cancel and declare null and void the purchase by The New York, New Haven and Hartford Railroad Company from The New York Central and Hudson River Railroad Company of 23,035½ shares of stock of the Rutland Railroad Company.

On the 9th day of May, 1912, the Commission authorized The New York, New Haven and Hartford Railroad Company to purchase from The New York Central and Hudson River Railroad Company 47,041 shares of the capital stock of the Rutland Railroad Company, and to take and hold the same. About the month of February, 1911, The New York Central and Hudson River Railroad Company sold, and delivered either directly or indirectly, to The New York, New Haven and Hartford Railroad Company 23,035½ shares of said stock. The Rutland Railroad Company is a domestic corporation, and the assent of this Commission was required for such sale and transfer under section 54 of the Public Service Commissions Law. No application was made to this Commission for any authorization to take and hold such stock at the time of the transfer nor until about December, 1911. In December, 1911, the New Haven company filed an application for authorization to hold said stock, together with other stock of said company, which application resulted in the granting of the authorization to purchase, take, and hold 47,041 shares.

The petitioners in this case opposed the granting of said application, but after the order giving authorization was made they did not in any manner seek to review the order of authorization, which stands in full force and effect.

The petitioners in this proceeding asked for an order requiring The New York, New Haven and Hartford Railroad Company to cancel the sale to it by The New York Central and Hudson River Railroad Company of said 23,520½ shares of stock of the Rutland Railroad Company, and to make a further order that said The New York, New Haven and Hartford Railroad Company desist and refrain from taking any part in the management or control of the Rutland Railroad Company or its affairs.

The petition is dismissed upon the ground that the whole matter was determined in the former proceeding.

Decided December 18, 1912.

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Guggenheimer, Untermeyer & Marshall for applicants.

E. D. Robbins for The New York, New Haven and Hartford Railroad Company.

A. S. Lyman for The New York Central and Hudson River Railroad Company.

STEVENS, *Chairman*:

The petitioners have filed with this Commission a petition, the prayer of which is as follows:

Your petitioners therefore pray that said Public Service Commission of the State of New York for the Second District may make an order requiring said The New York, New Haven and Hartford Railroad Company to cancel the sale by The New York Central and Hudson River Railroad Company to it of the said 23,520½ shares of stock of the Rutland Railroad Company, and that the said The New York, New Haven and Hartford Railroad Company desist and refrain from taking any part in the management or control of the Rutland Railroad Company or its affairs.

A copy of the petition has been served upon The New York, New Haven and Hartford Railroad Company and also upon The New York Central and Hudson River Railroad Company, and answers thereto have been interposed by both companies.

The facts in the case are as follows: Prior to February, 1911, The New York Central and Hudson River Railroad Company was the owner of 47,041 shares of the capital stock of the Rutland Railroad Company. In or about the month of February, 1911, it sold, and delivered either directly or indirectly, to The New York, New Haven and Hartford Railroad Company 23,035½ shares of said stock. The Rutland Railroad Company is a domestic corporation, and the assent of this Commission was required for such sale and transfer by section 54 of the Public Service Commissions Law. No application was made to this Commission for such authorization at the time of the transfer nor until about December, 1911. About November, 1911, The New York Central and Hudson River Railroad Company contracted to sell to the New Haven Company 23,520½ shares

of the stock of the Rutland Railroad Company; and on December 27, 1911, the New Haven company duly filed with this Commission its petition asking leave to purchase 47,041 shares of the preferred stock of the Rutland company, including the 23,035½ shares of the preferred stock of the Rutland Railroad Company which was sold and transferred in or about the month of February, 1911. A hearing was given upon the said application of the New Haven company after due notice, and at such hearing the petitioners herein duly appeared by their attorneys who represent them upon this application. Said petitioners opposed the application, and considerable testimony was given by both parties and briefs submitted. After due deliberation, by an order dated May 9, 1912, this Commission authorized the said The New York, New Haven and Hartford Railroad Company to purchase, take, and hold the 47,041 shares of the preferred stock of the Rutland Railroad Company, being the shares owned by The New York Central and Hudson River Railroad Company, and including therein both the 23,035½ shares sold in February, 1911, and the 23,520½ shares contracted to be sold in November, 1911.

At the time of the decision of the case and the making of said order the Commission unanimously agreed upon a statement of its reasons for the making of such order, which statement is as follows:

1. That the acquisition of the stock of the Rutland Railroad Company by the New Haven company is not believed to be in violation of the statute of the United States commonly known as the Sherman Law, and is not in violation of the principles laid down in any decision of the courts to which its attention has been called.

2. That the Rutland railroad, in connection with its subsidiary water line, the Rutland Transit Company, is a natural route between New England territory reached only by the New Haven road, and the West and Northwest; that the operation of the Rutland by the New Haven will in

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effect constitute a new through line from New England to all points reached by the Rutland Transit Company.

3. That the New York Central, which at present controls the Rutland, is to a material extent a competitor with the Rutland; while on the other hand the Rutland is by its connection with the Boston and Maine a natural extension of the New Haven system as at present operated, and that the natural effect of the control of the Rutland by the New Haven will be to increase competition and induce a very considerable increase of business over the Rutland from and to New England points.

4. That if such anticipated increase of business over the Rutland is realized it will afford additional facilities to the public and be of very considerable benefit to the cities and villages reached by the Rutland in New York and Vermont.

5. That the Commission adheres to the principle laid down by it in the Ontario and Western case, that in transfers of control of a subsidiary railroad it should recognize and protect the rights of minority stockholders. That it does not follow from this principle that in every case the purchasing road should offer to the minority stockholders the same price for their stock which it is willing to pay for control. While such a condition might well be imposed in a case where the transfer would create a control by a traffic line which did not theretofore exist, in the present case the control is now in the hands of the Central and the relief sought is merely the transfer of that control to the New Haven. If the result of the transfer to the New Haven is to increase the business of the Rutland and thereby increase its revenues, it will be to the manifest advantage of the minority stockholders. The position taken by the objecting minority stockholders has been that they are now injured by the treatment received from the Central. They do not suggest that the New Haven will accord them worse treatment, while on the other hand the Commission is satisfied that it will be to the advantage of the New Haven to develop the Rutland materially beyond what it is doing at

the present time. The transfer itself is, therefore, an advantage to the minority stockholders.

6. That it is to the public interest of that portion of the State of New York through which the Rutland passes that the control of the road be put in the hands of the New Haven company, and since this can be done without apparent injury to the minority stockholders, and in the opinion of the Commission with benefit and advantage to them, the authorization for the transfer should be made.

The petitioners have in no manner sought to review the said order, nor have they made any application for a rehearing in said proceeding.

In the month of May, 1912, an action was brought by the petitioners against the three railroad companies involved, in which, among other things, an injunction was asked restraining the transfer by the Central to the New Haven of the said 23,520½ shares of stock. An order to show cause was obtained in said action for an injunction *pendente lite*, and after argument the said motion was granted on or about July 11, 1912, and an order was entered restraining the defendant, The New York Central and Hudson River Railroad Company, from transferring, and The New York, New Haven and Hartford Railroad Company from receiving by transfer, said shares of stock. An appeal was taken by the railroad companies from said order, and the order has now been reversed by the Appellate Division of the Supreme Court for the First Department.

The petition in this matter alleges that in spite of the order made by the Special Term declaring the proposed sale of stock of the Rutland Railroad Company to be illegal, The New York, New Haven and Hartford Railroad Company has practically assumed control of the Rutland Railroad Company, and has caused various of its employees, officials, and nominees to be installed in positions in the Rutland Railroad Company, and that the business of the Rutland Railroad Company is now actually dominated and

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controlled by The New York, New Haven and Hartford Railroad Company through the instrumentalities named.

No hearing has been had upon the petition and answers filed in this case, nor is any deemed to be necessary. The petitioners have not pointed out what statute confers upon the Commission the powers which they seek to invoke in the prayer of relief hereinbefore quoted in full. If the Commission were to assume that they would be able so to do upon a hearing, still such hearing is deemed to be unnecessary for the reason that the Commission has in no respect changed its views regarding the case as set forth at the time of its making the order of May, 1912.

The order referred to was a determination in the case made by the Commission after the fullest consideration, and it is not alleged that either the New Haven or the Central has done anything or is contemplating doing anything which is not fully warranted by that order.

For these reasons the petition herein should be denied.

In the Matter of the Complaint of RESIDENTS OF GRANVILLE, Washington county, *against* GRANVILLE ELECTRIC AND GAS COMPANY as to rates for supplying electricity; and

In the Matter of the Complaint of RESIDENTS OF GRANVILLE, Washington county, *against* GRANVILLE ELECTRIC AND GAS COMPANY as to rates for supplying gas.

1. Respondent's changes in electric light rates noted, and its rate for residences reduced to basis of its business lighting rates for like amount of service.

2. Complaint as to respondent's rate for gas dismissed.

Decided December 31, 1912.

Milford D. Whedon for complainants.

Brodie G. Higley for respondent.

DECKER, *Commissioner*:

In these cases the prices charged for gas and electricity in Granville are alleged to be unreasonable. The rates involved are: gas, \$1.50 per thousand cubic feet, with 10 per cent discount for payment within 15 days; electric light, 15 cents per kilowatt hour for residences and 12½ cents per kilowatt hour for stores and business places, with 5 per cent discount for payment within 15 days.

The rates in effect after December 1, 1911, until March 7, 1912, were for electricity: residences, 15 cents per kilowatt hour; commercial (stores and business places), 13 cents per kilowatt hour for first 20 kw. h., 12 cents next 30 kw. h., 11 cents next 50 kw. h., 10 cents next 100 kw. h., 9 cents next 200 kw. h.; discount 10 per cent for payment within 15 days.

On March 7, 1912, the following rates were established and now are: residences, 15 cents per kw. h.; commercial (stores and business places), 13 cents per kilowatt hour for first 20 kw. h., 12 cents next 30 kw. h., 10 cents next 50 kw. h., all over above, 8 cents per kw. h.; discount 10 per cent for payment within 15 days. These rates of 1912 show considerable reductions of those previously in force for consumption of 50 kw. h. and over. The discount for prompt payment also has been increased from 5 per cent to 10 per cent on all bills.

So far as the evidence in this case discloses, this company is discriminating between its residence and business lighting. It has established for the first 20 kw. h. for business lighting 13 cents per kw. h. No reason appears why it should maintain a higher rate for house service, and accordingly its 15 cent rate for residences should be reduced to 13 cents per kw. h. It should also reduce its residence rate for larger quantities to correspond with its business rates. In other words, its residence and business rates for like quantities used should be the same. This ruling applies only to the facts and conditions shown in this case, and may or may not be applicable in other cases, being dependent upon the particular facts appearing herein.

We are not satisfied, upon the present condition of the company's operations, that the gas rate should be now reduced. It now has a net rate of \$1.35 per thousand cubic feet. Its operation and revenue may hereafter justify a reduction from that price. Except as above provided, we are not of the opinion that further reductions of the electric lighting rates should be at this time required.

Granville, incorporated in 1885, had a population by the 1910 census of 3920; in 1900 the population was 2700.

The Granville Electric and Gas Company was incorporated in 1903. It furnishes gas and electricity in Granville, and electricity in Middle Granville and in the town of

Granville. Until recently the company's affairs have been poorly managed. Its property had not been properly maintained, and improvements were necessary, not only to give good service, but for purposes of economical operation. Its records and accounts were in a deplorable condition. The financial situation of the company has, with the aid of the Commission, been thoroughly changed, and its accounts have been placed upon a proper basis. Certain improvements to the plant have been and are being made.

For the year ended December 31, 1911, its gross income over operating expenses was \$4606.14. Of that, \$4418.29 was from electricity, including light and power, and \$187.85 was from gas. Its electric year's receipts were \$17,192.33, and its gas revenue receipts were \$7229.53. Any material reduction of its gas receipts would on these figures produce an operating loss. Any considerable reduction of its electric revenue would on these figures so reduce its earnings that there would be very little left to be applied on the investment. Nevertheless, since that report was filed it has made some reduction in the larger quantity rates, and we are now readjusting the residence rates upon the basis of the business rates for like service, involving reduction of two or more cents per kw. h., depending upon the quantity used.

The respondent company will doubtless be in much better operating condition, as it will certainly be in better financial and accounting situation, under the improvements referred to and the rearrangement of its stock and bond issues which has been effected. It is possible that its gas operations will so improve that a much better financial return will be manifested in future, and that its whole business will be conducted henceforth more economically, under the changes due to improved plants and better business methods by the management now in charge.

Under the peculiar conditions surrounding this case, involving the necessity of an entire reformation of the respondent's financial and accounting methods and improvement of parts of the system, it has been necessarily held for determination.

The Commission will enter an order requiring the respondent to reduce its present residence lighting rate so that for like service the rates shall not exceed its present so called commercial rates: that is, rates for lighting business places, and it will enter an order dismissing the complaint as to rates for gas.

In the Matter of the Complaint of TRUSTEES OF THE VILLAGE OF OSSINING *against* NORTHERN WESTCHESTER LIGHTING COMPANY.

1. A franchise condition requiring a company to furnish the municipality free of charge light to a stated amount per annum is to be regarded as a general addition to the company's operating expenses as relating to all of its business, and is not to be considered as a factor in determining the reasonableness of the company's charge for public lighting, except to the extent that it is a general addition to the operating expenses and has its proportionate bearing upon the cost of furnishing such public lighting.

2. Respondent required to reduce its charges for street lighting in the village of Ossining so that they shall not exceed \$19 per year per 25 candle-power incandescent lamp, and \$90 per year per arc lamp of the kind and power in use.

Decided January 9, 1913.

T. G. Barnes for complainants.

Shearman & Sterling (by *J. A. Garver* and *P. F. W. Ruther*) for respondent.

DECKER, *Commissioner*:

In this case the Village of Ossining complains of respondent's charges for municipal lighting in that village. Respondent is the successor by merger of the Ossining Heat, Light and Power Company, the Northern Westchester Light and Power Company, and the Briarcliff Manor Light and Power Company. It affords gas and electric service. Its electric service is supplied in the village and town of Ossining; the villages of Pleasantville, Briarcliff Manor, Hillside, and Croton; and the towns of Mount Pleasant, New Castle, and Cortlandt. Gas is furnished by it to the village and town of Ossining. Its plant is in the village of Ossining. Its electricity is generated by steam power.

Respondent's lighting contract with the Village of Ossining entered into October 6, 1905, for a period of five years, and which therefore expired October 6, 1910, provided for the furnishing of village lighting at a price of \$7500 per annum, and there were to be 6 enclosed alternating arc lamps of 425 watts each and 300 incandescent lamps of 100 watts each, any additional lamps to be charged for at pro rata prices, and the lamps to be lighted every night from dusk to dawn. It is stated in the complaint that this contract was construed to mean \$100 per annum for each 425-watt arc lamp, and \$23 per annum for each 25-candle-power incandescent lamp, for all night service, 3925 hours burned per year. The complainants further allege that respondent demands \$100 per annum for each 425-watt arc lamp, and \$22 per annum for each 25-candle-power incandescent lamp, and that pending the execution of a new contract respondent demands \$100 for each arc lamp and \$23 for each incandescent lamp, per year.

The complainants allege that said proposed prices of \$100 per year for each arc lamp and \$22 for each incandescent lamp are unjust and unreasonable. The complainants further allege that the rates so demanded by respondent are in excess of the compensation charged by respondent for like service furnished in the village of Briarcliff Manor and in the village of Pleasantville, in that respondent charges the Village of Briarcliff Manor at a rate of \$22 for a part and \$20 for the remainder of the incandescent lamps used to light the public streets of that village; and that respondent charges the Village of Pleasantville for such service at a rate of \$19 per lamp per year for less than 150 lamps. It is claimed that respondent thereby subjects the Village of Ossining to undue and unreasonable prejudice and disadvantage.

The complaint also sets forth that respondent has been charging the Village of Ossining for use in the buildings used by the Village for public purposes 20 cents per kilo-

watt hour for lighting, while individual consumers within the village are charged at a rate of 15 cents per kilowatt hour. This feature of the complaint has been corrected by respondent.

It is prayed in the complaint that this Commission shall determine and prescribe the just and reasonable charges per lamp per year which shall be allowed for the service since October 6, 1910, the date of the expiration of the contract above referred to, and also the rates which shall hereafter be in force for street lighting in the village of Ossining; that these rates shall be fixed upon the basis of 425-watt arc lamp, all night service, 3925 hours burned per year, and 25-candle-power incandescent lamp, all night service, 3925 hours burned per year.

It is set forth in the complaint that under a franchise granted by the Village of Ossining to the Northern Westchester Light and Power Company on March 7, 1905, to which the respondent herein succeeded and under and upon which it is operating in said village, the respondent is required to furnish the Village of Ossining, free of charge, light to the amount of \$2000 per annum, and at such place or places within the limits of the village as the board of trustees may appoint. We find that the said franchise does so provide. The position of the respondent as to such annual charge against the company imposed by the franchise is that the amount of such annual charge, \$2000, may be properly added to what would be otherwise reasonable rates for the municipal lighting in Ossining, and respondent cites the opinion of the Commission in the matter of *Genesee Light and Power Company* (2 P. S. C., 2d D., 489), quoting as follows:

The underlying principle is that whatever a municipality receives from a corporation for a franchise may be added to the charge for service. If the payment is made annually in either money or service, the corporation may recoup itself directly from its customers in that year.

We held in the case cited that an annual charge in money or service to be paid or rendered to the municipality constitutes an operating expense, and for which the company is entitled to recoup itself in charges to its customers during each year. The clause of the franchise under consideration provides that "The company shall also during the continuance of the franchise supply the Village of Ossining free of charge with light to the amount of \$2000 per annum at such place or places within the limits of the village as the board of trustees may appoint". If we take respondent's view, the result would be to entirely nullify this provision. Assuming that the municipal lighting for Ossining should be computed at rates conceded to be reasonable, and that the total amounted to \$10,000 in a given year, it would be permissible, under respondent's contention, to so increase the rates that the total charge would be \$12,000, and in that way the additional \$2000 would be returned to the company. Precisely the same result would be reached if the provision for \$2000 of free lighting had not been inserted in the franchise. It is evident, therefore, that if the franchise provision for \$2000 of free municipal lighting is to have its intended force, such service to the amount in respondent's established rates of \$2000 must be regarded as an operating expense, to be distributed over all of respondent's business and not be applied to a particular part of its business such as lighting furnished to the Village of Ossining for its public streets and buildings. Undoubtedly this annual charge of \$2000 rendered in service has a proportionate bearing upon the street lighting rates under consideration, just as any other legitimate increase or addition to its regular operating expenses must have upon that or any particular service rendered by the company. But this is very far from saying that the entire amount, in this case \$2000 in service, shall be added to what would be otherwise a reasonable charge for that particular service. This annual charge is to be regarded as a general addition to its operat-

ing expenses as relating to all of its business, and is not to be segregated in its application, as respondent contends, to the lighting service which is rendered to the municipality. Taking now its effect upon the complaint, it is clear that, the reasonable street lighting charge having been determined, the intent of the franchise is that \$2000 of service at such charge shall be deducted from the street lighting bills of the Village. The purpose is the same as if the franchise condition required a money payment to the Village of \$2000 in return for the franchise.

On December 27, 1900, the Ossining Heat, Light and Power Company was incorporated for a term of fifty years, with capital stock of \$250,000, to manufacture gas and electricity for light, heat, and power, and for lighting the streets in the village of Sing Sing (now Ossining) and the town of Ossining.

On October 6, 1903, the Village entered into a municipal lighting contract with the Ossining Heat, Light and Power Company, covering a period of five years. The company under that contract was required to install 50 arc lights of a nominal rating of 2000-candle-power, and 100 incandescent lights of a nominal rating of 32-candle-power, render an all night service, and receive for each year covered by the contract the sum of \$80 for each arc light and \$20 for each incandescent light. Additional lights were to be installed by the company as the Village might direct, and the same prices were to be applied. Under that contract 90 incandescent lights of a nominal rating of 16-candle-power were to be supplied for lighting the public buildings, free of cost to the Village. This company, the Ossining Heat, Light and Power Company, seems to have been the successor of the Sing Sing Electric Light Company and the Sing Sing Gas Manufacturing Company.

On December 8, 1904, the Northern Westchester Light and Power Company was incorporated. On March 7, 1905, the village trustees granted a franchise to the Northern

Westchester Light and Power Company. The franchise runs for a period of fifty years.

On May 5, 1905, the Northern Westchester Lighting Company was incorporated, and on May 26, 1905, a certificate of merger was filed with the Secretary of State to the effect that the Northern Westchester Lighting Company was the owner of all the issued and outstanding capital stock of the Briarcliff Manor Light and Power Company, the Ossining Heat, Light and Power Company, and the Northern Westchester Light and Power Company. It follows, therefore, that the Northern Westchester Lighting Company is operating in the village of Ossining under the franchise granted March 7, 1905, by the village trustees to the Northern Westchester Light and Power Company.

On October 6, 1905, the Village of Ossining and the Northern Westchester Lighting Company, the present operating company, entered into the lighting contract referred to in the complaint as hereinabove set forth. It is stated in the agreement that "This contract supersedes that contract entered into on the 6th day of October, 1903, between the Village of Ossining and the Ossining Heat, Light and Power Company, and said contract of October 6, 1903, is hereby canceled and annulled, both parties consenting thereto". The contract further provides that it is not to be interpreted or construed as in any way modifying, changing, or annulling any of the terms or conditions of the franchise of March 7, 1905, which was granted to the Northern Westchester Light and Power Company. It is understood that the Northern Westchester Lighting Company, the respondent, has been charging the Village for lighting the prices named in the lighting contract which expired October 6, 1910, namely, incandescent lights at \$23 per annum and arc lights at \$100 per annum.

Following is a synopsis of the lighting provisions in the contracts which have been referred to:

Contract of October 6, 1903: 50 arc lights at \$80, 100 incandescent lights at \$20, and 90 incandescent lights free.

Contract of October 6, 1905: 300 incandescent lights at \$23, 6 arc lights at \$100, and \$2000 worth of light free.

Proposed contract: 17 arc lights at \$100, 455 incandescent lights at \$22, and \$2000 worth of light free.

Complainants put in evidence tables showing the prices for municipal lighting charged in Ossining, Pleasantville, Briarcliff Manor, Middletown, Nyack, Upper Nyack, Haverstraw, West Haverstraw, North Hempstead, L. I. (town), Oyster Bay, L. I. (town), Sea Cliff, Mineola, Floral Park, Patchogue, Bellport, Centre Moriches, Sayville, Bayport, Huntington, L. I. (town), Hornell, Newark, Norwich, Johnstown, Gloversville, Waverly; Sayre, Penna., and Athens, Penna. The table "A" shows prices for arc lights in places other than Ossining, ranging from \$60.73 to \$88 per annum. The number of arc lights used in these places ranges from 5 in Athens, Penna., to 105 in Hornell. All of the places mentioned which use arc lights at all, and apparently about half of them do use arc lights, have a greater number of arc lights than the 17 specified for Ossining, except Sayre and Athens. Excluding those places, the lowest number of arc lights used is 26 in Haverstraw. The 26 lights in Haverstraw are provided at a price of \$88 per lamp. The incandescent lights in all of the places mentioned have 25 or 32 candle-power, with few exceptions. The prices for the incandescents range from \$14 at Hornell to \$20, except at Sayre where \$30 is charged for a 50 candle-power lamp. Most of the prices are \$16, \$18, \$19, and \$20. The number of lamps used in these places runs from 42 at Middletown to 1040 in the town of North Hempstead. With a few exceptions, the electricity used in the towns named is produced exclusively by steam power.

Table "B," covering the operations of the Northern Westchester Lighting Company, Orange County Lighting Company, Rockland Light and Power Company, Nassau Light and Power Company, Patchogue Electric Light Company, Sayville Electric Company, Huntington Light and

Power Company, Fulton County Gas and Electric Company, Hornell Electric Company, Norwich Gas and Electric Company, and Sayre Electric Company, which companies operate in the localities above specified, presents figures covering population, average net price per kilowatt hour sold, motive power, operating expenses, current sold, revenue from sales, coal, and income account, and these items are subdivided in accordance with subdivisions set forth in the annual reports of the companies. The figures are from the 1910 reports of the corporations to the Commission. The population of the places mentioned are all under the population of Ossining, which is given as 11,480, except Middletown, 15,313; North Hempstead (town), 14,171; Oyster Bay (town), 20,481; Huntington, 12,004; Gloversville, 20,642; and Hornell, 13,617. It is unnecessary to set down in detail the figures contained in these tables. In operating cost, upon the basis of kilowatt hours sold, the Northern Westchester Lighting Company compares favorably with the other companies mentioned. In various other respects the table shows comparisons in favor of the respondent company. On the other hand, the respondent has called our attention to two companies: one the Utica Gas and Electric Company, and the other the Consolidated Light and Power Company of Whitehall, charging \$22.50 for incandescent lamps although their operating expenses per kilowatt hour sold is considerably less than the operating expenses of the Northern Westchester Lighting Company. It also shows that the Westchester Lighting Company charges \$100 per arc lamp in several places that it serves. The Westchester Lighting Company controls the respondent through ownership of stock. Mere comparison of the prices charged generally for gas or electricity in one community with those charged by other companies in other communities ignores the numerous differences in governing operating conditions. When all commercial lighting rates of a company in one locality are under consideration, evi-

dence as to rates charged by other companies in other communities can be little more than indicative of what the respondent might do if its operating conditions would permit, and its bearing would be only incidental as taken in connection with considerations really informing and controlling. When, however, a single branch of a company's business is drawn in question, such as its price for lighting the streets of a municipality, a comparison with the charges made by other companies in various localities has greater weight, particularly when the party offering the evidence has also brought together pertinent statistics of operation, as complainants have done in this case.

The respondent puts its cost per kilowatt hour sold at 3.872 cents. The exhibit put in by complainants states the cost per kilowatt hour at 3.06 cents.

If we apply to this street lighting respondent's full average cost of operating expenses per kilowatt hour, making suitable addition for lamp maintenance and allowances above such cost for proportion of fixed charges, we are unable to estimate a price amounting to \$22 per incandescent lamp or \$100 per arc lamp. No figures have been presented to us furnishing the basis for definite calculations, and what is said above is based upon the general knowledge of the Commission. It is for the interest of lighting companies to furnish municipal lighting at low profit, particularly where all night service is provided. Such service is rendered for the most part at a time when the company's operations are off the peak-load. Low prices also operate to induce municipalities to provide an increasing number of lights, and this increases accordingly the total profit of the company from street lighting.

This company supplies the Village of Briarcliff Manor its incandescent lights at \$23 per year, although the franchise of the trustees of Briarcliff Manor with the company entered into May 23, 1905, provides for \$24 per light per year. It also furnishes one or more private consumers in

Briarcliff Manor incandescent street lighting at \$20 per year. From time to time it has received some additional considerations or concessions, such as a minimum contract for total current consumed, permission to set poles on private property or on streets laid out by a land development company, use of a sidetrack, and placing a water-pipe through private right of way. These are reasons given for making this special street lighting rate of \$20 per year, but nothing appears in the contracts relating to the privileges above mentioned providing for such minimum price of \$20 per year, and it is to be inferred that the price was fixed, primarily at least, without reference to all of these privileges.

The franchise granted to the Briarcliff Manor Electric Light and Power Company by the Village of Pleasantville provides for the making of a contract for lighting the streets at a rate not exceeding \$19 per annum, and the lamps there referred to are 20 candle-power. Subsequently, on April 21, 1904, a lighting agreement was entered into between the Village and the Briarcliff Manor Light and Power Company for the furnishing of 100 25-candle-power lamps for a period of five years at \$19 per lamp. The Briarcliff Manor Light and Power Company is a predecessor of respondent. On June 2, 1911, the trustees of Pleasantville granted to the Northern Westchester Lighting Company authority to erect and maintain poles for electric wires, etc., for the purpose of furnishing electric light, heat, and power, and to lay conductors for gas, subject among others to the following condition:

The said company shall furnish a continuous day and night electric current to the Village and to the present and future consumers therein for light, heat and power at a rate not to exceed the existing maximum meter rate per kilowatt hour. . . . The price for street lights shall not exceed the price set forth in the agreement between the Village and the Briarcliff Manor Light and Power Company, dated April 21, 1904.

It follows, therefore, that respondent is furnishing at Pleasantville street lighting by 25 candle-power lamps, for

the sum of \$19 per lamp, and that the current for such lighting is manufactured within the village of Ossining and carried by transmission line to the village of Pleasantville.

Respondent now furnishes street lighting to municipalities as follows:

Village of Ossining, all night, 17 arc lights, 425-watts, \$100 per year.

Village of Ossining, all night, 472 incandescent lights, 25-c.p., \$23 per year.

Town of Ossining, all night, 17 incandescent lights, 25-c.p., \$24 per year.

Village of Briarcliff Manor, all night, 159 incandescent lights, 25-c.p., \$23 per year.

Village of Pleasantville, all night, 176 incandescent lights, 25-c.p., \$19 per year.

Village of Hillside, all night, 41 incandescent lights, 25-c.p., \$23 per year.

Village of Croton, until 1 a. m., 99 incandescent lights, 25-c.p., \$12 per year.

Village of Sherman Park, all night, incandescent lights, 25-c.p., \$23 per year.

Town of Mount Pleasant, all night, incandescent lights, 25-c.p., \$23 per year.

We are satisfied, as to the incandescent lighting, that the Village of Ossining is entitled to a considerably lower price for its street lighting than is accorded by respondent to the other places above mentioned as served by it, the current for which purpose is manufactured in Ossining and transmitted by electric transmission line to such places. It is possible that some exception might be made as to comparison with the Village of Pleasantville on account of the fact that the price per lamp has been carried over from the original franchise. But even though that condition may have consideration, it seems clear to us that the price at Ossining should not exceed the price in Pleasantville. We arrive at this conclusion not merely by the comparison of the price charged by the company in Pleasantville as compared with the price charged in Ossining, but upon condi-

tions of cost to the company for rendering the service in Ossining, so far as we have been able to arrive at a general conclusion as to such cost, and the record generally as made in this case. We do not think that the apportionment of the annual charge due to required free lighting in Ossining has sufficient bearing to alter this view. We are of the opinion that the price of \$100 per arc lamp which the respondent is now charging in the village of Ossining is excessive, and should be reduced so as not to exceed \$90 per such lamp. Order should be entered requiring the respondent to cease and desist from its present charges for street lighting in Ossining, and henceforth not to exceed for such street lighting service \$19 per 25 candle-power incandescent lamp per year, and \$90 per year per arc lamp of the kind and power now in use.

This ruling applies to the future, and has no application to charges made at present or in the past.

In the Matter of the Complaint of the LEHIGH VALLEY RAILROAD COMPANY *against* INTERNATIONAL RAILWAY COMPANY, asking for an interlocker at the grade crossing of the tracks of the two roads in Union road, in the town of Cheektowaga.

In this case the facts are peculiar and of too complicated nature to admit of the usual brief statement contained in the headnote. The point decided is that the International Railway Company should, under all of the circumstances of the case, construct, maintain, and operate an interlocker at the crossing of its tracks at grade over the tracks of the Lehigh Valley railroad and the Erie railroad in Union road, in the town of Cheektowaga.

Decided January 14, 1913.

Porter Norton for International Railway Company.
E. H. Boles for Lehigh Valley Railroad Company.
W. L. Marcy for Erie Railroad Company.

STEVENS, *Chairman*:

The facts in this case are so peculiar and complicated as to require a careful statement of all the details. It is only in this manner that the real questions to be decided can be sifted out.

The tracks of the Erie Railroad Company and of the Lehigh Valley Railroad Company cross Union road, a public highway in the town of Cheektowaga. The rights of way of the two railroad companies are adjacent, and the distance between their nearest tracks is 69 feet. Each railroad is double tracked. The International Railway Company has a line of track extending along Union road, the public highway, crossing the four tracks of the two railroad companies.

The steam railroads were constructed before the street railroad was built, and hence are senior in point of time.

The crossing of the Lehigh tracks by the trolley tracks was effected pursuant to an agreement between the two companies, or rather their predecessors, who will here and elsewhere in this memorandum be treated the same as the existing companies which have succeeded to all of their rights and liabilities. This agreement was executed on the 21st day of September, 1892, and is in full force and effect at the present time. The crossing required by this agreement was simply the installation of the ordinary crossing frogs, and such it has remained up to the present time.

The twelfth clause of this agreement reads as follows:

12th. If by reason of said crossing by said party of the second part it shall hereafter become necessary in the judgment of the chief engineer for the time being of the parties of the first part [the Lehigh] or by order of the proper authorities of said Town or other public authorities, to have additional or improved structures or appliances, said party of the first part may construct such structures and appliances and the party of the second part will pay the cost of such structures and appliances.

About 1904 the Lehigh deemed it essential that an interlocker be installed at this point, and negotiations were had with the International which finally resulted in the agreement to install an interlocking plant pursuant to the provisions of the twelfth paragraph of the agreement just cited. The Lehigh accordingly constructed an interlocker at an expense of something upward of \$5000, which cost has been paid to the Lehigh by the International. After the construction of this interlocking plant and when it was about ready to operate it was inspected by the electric railroad inspector of this Commission, who pronounced the same dangerous to operate by reason of the proximity of the north derail to the tracks of the Erie railroad. The precise situation in this regard will be explained later. The criticism of the inspector was deemed well founded, and in fact is recognized by every engineer as being correct. The result was that neither the International nor the Lehigh has put the interlocker in operation.

The interlocker was completed about March, 1909. The matter stood in this situation until October, 1910, when the Lehigh filed a complaint with this Commission against the International, setting forth such of the foregoing facts as it deemed material. The prayer for relief was as follows:

Wherefore the complainant prays that this matter be investigated by the Commission, and that it make an order in pursuance of the powers conferred upon it by section 45 of the Public Service Commissions Law requiring the defendant to permit the completion of an efficient interlocking plant at said crossing in accordance with the plans heretofore submitted as aforesaid to and approved by the Commission on July 30, 1908, and requiring the defendant to assume the cost of the maintenance and operation of said plant.

The International interposed its answer to this complaint, said answer being filed with this Commission October 31, 1910. The concluding paragraph is as follows:

That if in the judgment of the Commission it shall deem an interlocking device operated from a tower at said Union road to be necessary, this defendant asks that the Commission determine that all changes, improvements, or additions necessary to carry the same into effect require the joint action of the complainant, the Erie railroad, and this defendant, and that the cost of construction and installation of such additional plants as may be necessary in order to make the plant effective for said three railroads be apportioned between the said corporations, and that the cost of operation and maintenance of the plant be apportioned between the complainant and the Erie railroad.

A hearing was had upon the foregoing complaint and answer on the 11th day of November, 1910, at which hearing it was developed that the interlocking plant had been constructed and paid for as hereinbefore stated; that it was unsafe to operate owing to the proximity of the north derail to the southerly track of the Erie railroad; and that to make the interlocking plant safe and efficient it should be extended so as to cover the Erie crossing as well as that of the Lehigh. It further appeared that the Lehigh and International did not agree as to who should pay the operation and maintenance charges incident upon the installation and opera-

tion of the interlocking plant. It was assumed and stated by counsel for both the Lehigh and the International that there is no provision of law conferring upon this Commission power to determine what parties should bear and in what proportion the expense of maintenance and operation of an interlocking plant. They therefore proposed to submit the question in controversy between them as to such expense to arbitration, the Commission to be the arbitrators, and the whole matter to be disposed of by the Commission pursuant to their stipulation for arbitration.

In consequence of the foregoing, the Commission on the 30th day of January, 1911, made an order reciting such of the foregoing matters as seemed to be material, containing the following ordering clause:

Ordered: That pursuant to section 50 of the Public Service Commissions Law a hearing in the above entitled matter is hereby appointed to be held at No. 1216 Chamber of Commerce Building in the city of Buffalo, on the 10th day of February, 1911, at 10 o'clock a. m., and the Lehigh Valley Railroad Company, the Erie Railroad Company, and the International Railway Company are hereby directed and required to appear at said hearing, to the end that a determination may be reached with reference to all points involved in the construction, maintenance, and operation of a joint interlocking system which will include both of the above mentioned crossings of the Lehigh Valley Railroad Company and the Erie Railroad Company, and which will provide for the proper construction of derails, having regard for safety of operation under all the circumstances of this case, and that an appropriate final order may be entered in the premises.

This order was duly served upon the three corporations named, and on the return day named in the order they all appeared by their respective attorneys. The Erie being unprepared to proceed at that time, the case was adjourned to March 3, 1911, at which time a final hearing was had, all evidence which any party desired to offer was submitted, and the case closed so far as the taking of evidence was concerned.

At this last hearing it was shown by the Erie that the International procured the crossing in question over its tracks by condemnation proceedings, pursuant to the Railroad Law as it existed at that time. Those proceedings culminated in a final order and judgment of the Supreme Court of the State of New York granted at a special term held on the 27th day of November, 1893. This judgment confirmed the report of commissioners appointed for the purpose of determining the manner of crossing and the compensation to be awarded therefor, and the report is set out in detail in the judgment. The report and judgment determined that the International should cross the tracks of the Erie at the point where such crossing now exists and in the manner in which it now is constructed, and it also gives numerous directions as to the management of the crossing. It further provides that the International shall pay the Erie the sum of \$25 per annum, payable in semi-annual payments of \$12.50 each, on the 1st days of April and October in each year, as and for and in full compensation to said Erie Railroad Company for any and all damage and expense caused said defendant by the plaintiff's tracks and cars crossing the defendant's lands, roadway, right of way, and tracks at said crossing. It also awarded to the Erie Railroad Company the sum of \$1 damages for the right to cross, the Erie owning the fee of the soil to the center of the highway.

At the hearing before the commissioners it appears that the Erie contended that the crossing should be made by means of an undercrossing; or if no undercrossing is constructed, then a tower with interlocking signals should be erected and maintained; or if neither of these means should be ordered, that a tower should be erected and maintained so as to operate a lever constructed with the derailing track of the International. All of these requests of the Erie were denied, and the crossing was made at grade, with what is known as the Rochester derailing device.

After refusing the foregoing requests of the Erie, in their report the commissioners make the following statement:

In making this report the Commissioners desire to state that on account of the fact that the plaintiff's track crosses the Lehigh Valley railroad at grade but a short distance from the defendant's right of way and tracks, and also carries very heavy and permanent substructure consisting of tunnel tracks walled up with stone and under a large and expensive trestle over said tunnel track but a short distance from the defendant's tracks on the north belonging to The Delaware, Lackawanna and Western Railroad Company, we find that it is practically impossible without bringing in these other railroad companies as parties to provide an under- or overcrossing at the point in question. Inasmuch as the view up and down defendant's tracks in a straight line in an easterly and westerly direction is unobstructed for upward of two miles, and there is little or no grade to affect the situation and the running of trains, we do not consider it just or proper or necessary to require the erection of a tower and interlocking switches at this crossing. The chief particular advantage of a tower at this particular crossing over the Rochester device which we have recommended is claimed to be the fact that a man operating the tower system would have a better view in case of a fog than a man operating the Rochester switch at grade with the tracks in question. We do not coincide with this view, and if we did, we do not think that the danger at this crossing is sufficiently great to require that either party to this proceeding should be put to the large expense of erecting and maintaining a tower and interlocking switches.

The judgment orders "that the said report of said commissioners and the ascertainment and determinations therein contained be and it is and they are in all things confirmed".

The crossing construction directed by the court pursuant to the report of the commissioners is as follows: On the north side of the Erie tracks, and about 671½ feet from the north rail, there is a derail provided; and on the south side of the Lehigh tracks (the Lehigh being the southerly road of the two) a derail is provided 60 feet from the southerly rail of the Lehigh. Each derail is operated by a lever. A car approaching from the north necessarily halts before reaching the derail, and can not pass that point until after

the motorman has passed over the tracks to the lever upon the other side and then has thrown the switch so that the car can proceed. The car is not at liberty then to proceed until a signal is given by the conductor that it shall go forward. With cars approaching from the south the operation is precisely the same.

The objection to the use of the interlocking system constructed by the Lehigh is that the derail upon the north side of the Lehigh tracks is placed within the Lehigh right of way. The distance from the north rail of the Lehigh to the south rail of the Erie is only 69 feet, and a car proceeding south and crossing the Erie tracks might be halted by the derail so that the rear end of the car would remain upon the Erie tracks, thereby exposing it to collision with a passing train of the Erie. In short, it is agreed that the derail can not safely be placed in the limited distance between these two tracks.

The International runs trailers with some of its cars, and sometimes runs two-car trains. At the first hearing the following question was asked of the general manager of the International:

Q. In other words, your position is, it is absolutely unsafe to have any chance of derailing the car between these tracks (referring to the Erie and Lehigh tracks) ?

To this question the answer was "Yes".

Q. There is not space in there enough to get in a proper derail so that your car, if derailed — it will expose you to further dangers?

A. Yes.

There is no suggestion in the case that any one differs from this conclusion, hence it is unnecessary to pursue further the question whether a derail can be operated between tracks.

It is unquestioned that a joint interlocker can be constructed at this point which can be operated for both crossings from the tower already constructed, by one operator.

Expense Involved:

The tower and apparatus for signals and derailling already installed have cost the sum of \$5454.79, which sum has been paid by the International to the Lehigh. It is estimated by the International in its brief that the annual expense of maintenance and operation would be \$2807. Just how this amount is made up does not appear. A letter from counsel to the International dated December 15, 1910, contains the following:

I inclose herein a statement from our book of the total cost of operation and maintenance of the tower for the years 1909 and 1910 on our Lockport division of the Central railroad, which Mr. Wilson who made the estimate for me said in his judgment would be a fair estimate of the maintenance and operation of the interlocking tower at the Union road.

The statement accompanying the letter shows that the total cost of operation for one year was \$1438.59, and maintenance for the same time was \$384.22: a total for the year of \$1822.81.

At page 112 of the minutes, Mr. Wilson, the general manager of the International, states that he has made an estimate of the entire cost of maintenance and operation of a similar tower, and his estimate is \$2800 a year, the maintenance being about \$500 and the operation about \$2300. At page 114 Mr. Wilson states that the cost of the additional installation required for the purpose of covering the Erie tracks will be about \$3000; and at page 115 he estimates the entire maintenance at \$500 a year, or about \$100 for that portion of the plant required by the Erie tracks.

Positions of the Various Parties:

The International admits that under its contract with the Lehigh executed in 1892 it is liable for the expense of constructing and installing the interlocker at the Lehigh crossing. This expense it has already paid.

It desires that the interlocker be extended so as to cover the Erie crossing, and claims that the expense of the installa-

tion of such extension should be borne by the Erie and International jointly.

It claims that the expense of maintenance and operation of the joint interlocker should be borne by the three corporations jointly.

The Lehigh claims that the expense of maintenance and operation should be borne by the International. It bases this claim on several grounds:

First, the contract of 1892;

Second, the fact that the International is the junior road and that the junior road should always bear such expense;

Third, the practical construction of the contract which has been given to it by the International and the alleged recognition by the International of its duty to pay maintenance and operation charges until a recent period.

The Erie contends —

1. That the judgment of the Supreme Court permitting the crossing at grade without an interlocker in the manner prescribed in the judgment is conclusive upon this Commission and that it has no power to change that determination, the situation as to danger not having been changed in any respect, as it claims. To support this claim it produced proof showing that no more cars are operated over the crossing by either the steam or the electric road than in 1893, and that the physical conditions have not changed in any respect so as to create a greater danger at the crossing.

2. That safety does not require the construction of an interlocking plant at this crossing. To sustain this contention as a matter of fact it relies upon the adjudication of the court and also upon the further fact that no accident has occurred at this crossing since its construction, as well as upon the physical conditions, there being a straightaway view of two miles in either direction along the Erie tracks.

3. That if the interlocker is installed it is not liable for any part of the expense of either installation, maintenance,

or operation, and this chiefly by reason of the fact that the International is the junior road and there is no equity requiring the Erie to pay any part.

Questions Involved:

The facts in this case raise some novel and peculiar questions as to the power of the Commission:

First, it can not order an interlocking system for the Lehigh alone, owing to the physical situation. In fact, it has practically prevented the operation of the interlocker already installed on the ground that it creates more danger than it prevents.

Second, what power, if any, has the Commission to determine who shall pay the expense of maintaining and operating the interlocker, if one is erected? Counsel for the Lehigh and International both agree, rightly or wrongly, that such power has not been conferred upon the Commission, and put the question before us for decision as arbitrators.

Third, the Erie raises the question that the judgment of the Supreme Court is conclusive upon us as to the necessity for an interlocker at its tracks. It further raises the question that safety does not require an interlocker in any event, and relies upon the indisputable fact that no accident has ever occurred at this crossing under the system of operation directed by the court. Again, it claims that we have no power to require it to pay any portion of the expense.

Discussion of the Foregoing:

Whatever power the Commission possesses in the premises is found in section 50 of the Public Service Commissions Law. It is better to select the pertinent language from this section rather than cite it in full. The first sentence provides that if in the judgment of the Commission having jurisdiction, additional construction, apparatus, or device for use by any railroad corporation or street railroad corporation in or in connection with the transportation of

passengers or property ought reasonably to be provided, or any additions or changes in construction should reasonably be made thereto in order to promote the security or convenience of the public or employees, the Commission, after a hearing either on its own motion or after complaint, may make and serve an order directing such improvements, changes, or additions to be made within a reasonable time, and it then becomes the duty of the corporation upon which the order is served to make the changes and additions thus required of it; and it follows as a matter of course that the corporation must pay all the expense of construction and installation, and if any expense is involved in operation it must also pay such expense. This sentence clearly has reference to such construction as affects the property of one road. Where the construction involves the property of two roads such construction is governed by the second sentence of the same section, which provides —

If any repairs, improvements, changes or additions which the Commission has determined to order require joint action by two or more of said corporations the Commission shall, before entry and service of order, notify the said corporations that such repairs, improvements, changes or additions will be required and that the same shall be made at their joint cost, and thereupon the said corporations shall have thirty days or such longer time as the Commission may grant within which to agree upon the part or division of cost of such repairs, improvements, changes or additions which each shall bear. If at the expiration of such time such corporations shall fail to file with the Commission a statement that an agreement has been made for a division or apportionment of such repairs, improvements, changes or additions, the Commission shall have authority, after further hearing, to fix in its order the proportion of such cost or expense to be borne by each corporation and the manner in which the same shall be paid and secured.

The provision for further hearing, if it should become applicable in this case, has been waived by all the parties involved; and by stipulation it is provided that if the Commission finds this section to be applicable, it may go on and make the determination without giving notification, waiting the thirty days, and then proceeding to further hearing.

The parties disagree upon the question of division of cost, if any there should be, and have submitted their briefs upon the entire question, and the Commission is at liberty to proceed under the stipulation to a decision of the same. The difficulty in this case to be overcome is that neither this section nor any other provides for apportioning the cost of operation of a device which is jointly used and requires joint action to operate. The draughtsman of this section apparently did not have in mind such a contingency, and because of the absence of direct language conferring the power of apportioning the cost of operation upon the Commission, counsel for the International and the Lehigh have agreed to arbitrate the point and selected the Commission as arbitrators. Their view and the resulting agreement do not deprive this Commission of the power and jurisdiction to determine the division of cost if it is conferred by the statute.

Passing this point for the present, it should next be pointed out that if the contention of the Erie is correct: that the Commission has no power to order an interlocker at its crossing, it is practically inhibited from ordering an interlocker at the Lehigh crossing, and therefore it becomes somewhat important to determine what question should be first taken up and decided in order to determine the effect of such decision upon the other points in the case.

Without dwelling further upon the embarrassments and difficulties, and after much reflection as to the method of meeting them, I suggest the following course of procedure.

The whole case arises directly from a provision in the contract or agreement between the International and the Lehigh. Under that provision the Lehigh has the right to require the International to install additional or improved structures or appliances at this crossing. That provision is the twelfth, and has been hereinbefore quoted in full, but for clearness will be repeated at this time.

12th. If by reason of said crossing by said party of the second part it shall hereafter become necessary in the judgment of the chief engineer

for the time being of the parties of the first part or by order of the proper authorities of said Town or other public authorities, to have additional or improved structures or appliances, said party of the first part may construct such structures and appliances and the party of the second part will pay the cost of such structures and appliances.

The Lehigh has required the construction and installation of an interlocking plant pursuant to this provision. The International has acquiesced in the position of the Lehigh that it was entitled to require such construction and installation, and it has paid the expense which has been incurred to that end. The parties differ only upon one point, and that is, by whom the expense of maintenance and operation shall be paid: the Lehigh claiming that the contract fairly requires that such expense shall be paid by the International, and the International claiming that it should be apportioned between the two. The contract concededly does not contain explicit words upon this point, and which party is right is necessarily a matter of construction.

We should determine in the first instance what is the proper construction. Upon this point I submit the following considerations:

First, the International is the junior road, and I think it may be fairly said that the general custom is that a junior road shall pay all the expense of constructing and maintaining a crossing. This is not invariably true, as is shown by the contract with the predecessor of the Erie put in evidence by the International.

Second, in every place where the payment of expense is mentioned in the contract, such payment is to be made by the International. Thus the first paragraph provides that the International will construct the crossing and approaches. The second provides "that the said crossing shall be constructed and maintained in good order and in manner and condition satisfactory to the chief engineer for the time being of either of the parties of the first part *by and wholly at the expense of the said party of the second part*". This provision shows that the maintenance of the crossing was to

be taken care of by the International. As the crossing was constructed in the first instance, and as it was contemplated to be constructed, there was no operation cost in the sense of operating an interlocker, but the crossing was to be maintained in good order by the International by and wholly at its expense. It is difficult to see why this provision does not apply to the crossing as it may be constructed under any other clause or paragraph of the contract. The third paragraph provides that the crossings, and all frogs, rails, and other materials and appliances in connection therewith, shall be forever maintained in manner and condition satisfactory to the chief engineer for the time being of the Lehigh. The burden of maintaining the property according to this clause is clearly upon the International. It does not apply merely to the frogs and rails, but to all other materials and appliances in connection therewith, and it seems to be reasonably clear that such appliances are those contemplated in the original construction or which may thereafter be installed pursuant to any other provision of the contract.

The fourth clause provides that the Lehigh may at any time thereafter put in additional tracks or change the tracks across the street, and that in case it shall so do the International "shall forthwith, after notice so to do, at its own expense make such changes as may be necessary to cross any such additional or altered tracks in the manner hereinbefore provided, and all the provisions of this contract shall then apply to such additional and modified tracks, crossings, and appliances". That is to say, the International shall pay all the expense of crossing such additional tracks as the Lehigh may at any time put in.

The fifth clause requires the putting in of suitable planking for paving which may be required by the chief engineer of the Lehigh or by the proper authorities of the Town of Cheektowaga. This paving the International is to pay for and thereafter maintain in good condition, and the International is to do and perform all acts and things in respect

of paving and re-paving, planking and re-planking which the Lehigh is or may be required by the town authorities of the Town of Cheektowaga to perform.

In the tenth clause the International assumes all responsibility and liability to any and all persons for any and all injuries and damages to persons and property which may happen or arise or be done or caused during or by reason of the construction or maintenance of its said railway tracks, poles, wires, or appliances, used in connection with the crossing of the tracks of the parties of the first part as herein provided, *excepting such injuries or damages as may be caused by the sole negligence of the parties of the first part* [the Lehigh]. The International agrees that it will indemnify and save harmless the Lehigh from all claims, demands, suits, recoveries, or judgments which may arise or be made, brought, or recovered by reason of any such injuries or damages excepting as aforesaid.

The eleventh clause provides —

The privileges hereinbefore granted are granted upon a further express condition that whenever anything may be done or may be required to be done under and in pursuance of any of the laws of this State or by any action of the proper authorities of the Town of Cheektowaga in respect to said crossing, the party of the second part [the International] shall at its own expense make all necessary changes in its grades and tracks and appliances necessary according to the requirements of such law or action of such authorities.

The twelfth and one-half clause is significant:

If by reason of said crossing by said party of the second part it shall hereafter become necessary in the judgment of the chief engineer for the time being of the parties of the first part or by order of the proper authorities of said Town or other public authorities, that a flagman or gateman be stationed at the said crossing, said parties of the first part may appoint such flagman or gateman and the party of the second part will pay to the parties of the first part one-half of the expense thereof, and the said parties of the first part agree that upon complaint made by the party of the second part they will discharge any such flagman or gateman.

The International looks upon this as a provision showing that the expense of operation of any appliance installed

under the twelfth clause is not to be paid solely by the International. A little analysis of this position will show that it is not warranted. A flagman or gateman could not be installed by reason of the existence of the tracks of the International running longitudinally along the highway. It was possible that a flagman might be ordered at the Lehigh crossing by a public authority, to be kept there at the expense of the Lehigh. Such flagman would not be installed by reason of the existence of the International, but for the protection of the traveling public other than it. The expense would be chargeable solely to the Lehigh. The Lehigh takes the opportunity afforded by this contract to require the International to pay half of an expense which might possibly devolve upon it alone. This seems to me to be convincing proof that in connection with the other clause hereinbefore referred to, the Lehigh did not propose to be subjected to any direct expense whatsoever by reason of this crossing, and in fact proposed to exonerate itself to the extent of one-half of an expense which might devolve upon it even if the International were not there. In short, in every phrase and clause of this contract which relates to expense, that expense is thrown upon the International and it alone. This the Lehigh had a right to do in making such an agreement; and to me the conclusion seems irresistible that it was fairly within the contemplation of the parties that all direct expense arising from this crossing should be paid by the International; and it seems to me that the proper construction of the twelfth clause is that if either the chief engineer of the Lehigh or the public authorities should thereafter require additional or improved structures or appliances at this crossing, such improved structures or appliances would be regarded as taking the place of the structures or appliances contemplated by the first and second paragraphs of the agreement, and that the contract should be interpreted precisely as though the second paragraph followed the twelfth instead of preceding it. There can be in

my judgment no reasonable escape from this position, so far as maintenance is concerned; and I conceive that it is equally clear that if an improved appliance or structure is installed pursuant to the provisions of the twelfth paragraph, and such appliance or structure requires operation, that it is the International which must operate it. It would be a vain thing to install an interlocker without operation; and it would be extraordinary if the Lehigh, in making repeated provisions in the contract that all direct expense of construction and maintenance should be paid by the International, did not contemplate that the expense of operation of improved appliances should also be borne by that company.

My conclusion from the foregoing is that the provisions of the contract require that the cost of maintenance and operation shall be borne by the International. If therefore the contract is to govern, that is the end of that question.

A further consideration may be added upon this point. The construction of the interlocker does not require the joint action of the two roads. Under the agreement between them it is the duty of the International to construct, and this duty it has recognized by paying for the construction. I do not see any chance for argument upon the proposition that where it is the duty of the International to construct an interlocker, the duty to operate follows as a matter of course as well as the duty to maintain.

It would seem to be true that the Lehigh can not apply to this Commission to order the specific performance of the agreement. Its remedy in case of a failure on the part of the International to observe that agreement would seem to be either to assert its right under the fourteenth clause of the agreement: which provides that the right of crossing granted to the International shall cease and terminate upon its failure to observe and keep the various covenants and agreements made by it, or to apply to the Supreme Court for a specific performance of the contract. This Commission's

power to order an interlocker and its operation depends upon section 50 of the Public Service Commissions Law, and not upon any contract; and under section 50 it would order an interlocker because the safety of the crossing requires it, not because the International had agreed to put in an interlocker when required by the Lehigh. The agreement requires the International to put in the interlocker whether safety requires it or not, provided the chief engineer of the Lehigh requires it. If the interlocker were ordered by the Commission, the order would have to be directed to both roads, for the reason that it requires the joint action of both to put in the interlocker. In such case the Commission may apportion the expense of installation as it deems proper. If the case were to assume that form, it would seem to me to be reasonable, although the Commission might not be required so to do, to apportion the expense between the parties, or to impose it upon one party alone in strict accordance with the terms of the contract, since it was by availing itself of the provisions of the contract that the International secured the right to cross the Lehigh; and I think that so far as those provisions are not oppressive, they should be enforced. I am further clearly of the opinion that as a general rule, although to this there may be some exceptions, the expense of crossing should be borne by the junior road. I can conceive of no reason in this case why the Lehigh should bear any part of the expense of crossing or maintaining the crossing, it having received no compensation for the crossing, and the existence of the International's tracks being of no benefit or advantage, direct or indirect, so far as I can see, to the Lehigh. Of course the International should have the right to cross, but only upon terms which would protect the Lehigh against affirmative expense. The usual incidents of crossing the Lehigh must bear without complaint.

The foregoing considerations would seem to dispose of the controversy between the Lehigh and the International.

We must now turn to the crossing of the Erie. The following would seem to be the facts which should determine the disposition of this case so far as the Erie crossing is concerned:

1. The Erie is the senior road of the three. Its tracks existed in their present location before the construction of the Lehigh or the International.

2. At the time the International effected its crossing, by condemnation proceedings, over the Erie tracks, the Erie struggled but in vain to have the commissioners order an interlocker installed. This must have been done, as the law then stood, as I understand it, at the expense of the International. There was no provision of law at that time which I have been able to discover which enabled the commissioners or the court to apportion the expense of an interlocker between the two roads in condemnation proceedings. If the interlocker had been then ordered, it must have been installed and operated, I think, at the expense of the International. The record shows that the International opposed the construction of the interlocker.

3. The danger existing at this crossing has been created solely by the act of the International in extending its tracks across the Erie.

4. The case is entirely barren of evidence that if the Erie crossing alone were considered, the danger is such as to justify and require the installation of an interlocker unless the rule be followed that an interlocker should be required at every point where an electric road crosses a steam road.

5. After full consideration, the commissioners in condemnation proceedings found that the danger at this crossing was not sufficient to warrant the requiring of an interlocker; and this finding it may be said has been justified by the fact that in the nineteen years which have elapsed since the finding was made, no accident has occurred at the crossing, and no intimation has been given of any narrow escapes occurring at that point.

6. There must be an interlocker at the Lehigh for the reason that the Lehigh has power under its contract with the International to require one. The danger which is shown in this case other than the usual danger of a grade crossing arises from the proximity of the Lehigh to the Erie, and the impossibility of placing a derail between the tracks of the two companies without enhancing instead of diminishing the danger. The proximity of the Lehigh tracks is nothing for which the Erie is responsible.

7. So far as the Lehigh and the International are concerned, this case has been presented upon the theory that an interlocker is required at this point solely by reason of the fact that the Lehigh is entitled by the terms of its agreement with the International to require the interlocker. It is entirely true that the Commission might upon its own motion, from a view of the location, determine that the dangers were such as to require additional crossing protection.

From the foregoing material facts I deduce the following conclusions:

1. That having opposed the construction of an interlocker at the time when it would have been required to pay the expense thereof, and when the Erie was vigorously asking for such construction, the International is not now in a position to say that the Erie upon precisely the same state of facts should be required to pay a part of the expense of either installation, maintenance, or operation.

2. That so far as the Erie is concerned, the case must be disposed of by the dangers existing at its crossing alone. It can not be justly required to participate in any dangers which are created by the existence of the Lehigh crossing or of any difficulties which may attend the attempt to eliminate such dangers.

3. That if we consider the Erie crossing alone, a case has not been made out which would justify upon the merits the ordering of an interlocker, except as before stated upon the rule that an interlocker should be ordered at every grade crossing of an electric road with a steam road.

4. We conclude, that under all of the circumstances of the case the interlocker which has been erected should be extended so as to take in the Erie crossing; and that the expense of installation, maintenance, and operation should be borne exclusively by the International. The cost of installation is conceded to be only about \$3000, the annual maintenance only about \$100, and there would be no additional cost for operation.

It is not essential to the decision made that there be any ruling upon the position of the Erie, that the decision of the Supreme Court confirming the report of the commissioners is binding upon this Commission, and that it can not change that decision. It is, however, proper to remark that we do not concur in this view. Section 50 of the Public Service Commissions Law gives us absolute and sweeping power to require changes in and additions to construction for the purpose of conserving the safety of the public and the employees of the railroad companies. It makes no difference how the condition came about, whether by direction of a court, by agreement of the parties, or in any other manner which may be suggested. This Commission is given power by the Legislature to relieve an unsafe condition according to its judgment and discretion. The fact that there has been no accident at this crossing since it was created by the order of the court has no bearing upon the legal proposition. If the proposition submitted by the Erie is correct, if there had been a killing every day since 1893 at this point, this Commission would have no power to order an interlocker nor to stop such disastrous results, and the decision made in 1893 would have to stand for all time as a method of crossing unless the railroads jointly and voluntarily agreed to change it. The Legislature itself would be powerless, because obviously the Legislature has conferred upon this Commission by section 50 all the powers which it possesses in cases.

In the Matter of the Complaint of the ATTICA WATER,
GAS AND ELECTRIC COMPANY *against* ALDEN-BATAVIA
NATURAL GAS COMPANY, alleging unjust discrimination.

By a preliminary order entered in this case on the 23rd day of January, 1912 (Opinion No. 121), it was held that the Commission had jurisdiction and power to order and direct the respondent to supply gas to the petitioner on the same terms upon which it is supplying gas to the Attica Natural Gas Company, and the case was by that order set down for a further hearing at which the respondent was given an opportunity to show any good reason why the Commission should not require it to supply natural gas on the terms and conditions above mentioned.

After hearings had herein

Held, upon the evidence submitted, that no good reason is shown why gas should not be served by the respondent to the petitioner upon the terms mentioned, and it is so ordered.

Where a gas corporation has a plant actually in existence in a municipality, and has made contracts with such municipality for the furnishing of service and is admittedly a corporation doing business and serving customers in such municipality, its legality and right to do business in this State can not be questioned by another public service corporation in a proceeding of this character.

The facts and circumstances under which the order is made fully stated.

Decided January 21, 1913.

G. P. Stockwell, 53 Main street, Attica, N. Y., for the complainant.

Bayard J. Stedman, 9 Masonic Temple, Batavia, N. Y., for the respondent.

OLMSTED, *Commissioner*:

On the preliminary hearing in this case the respondent denied any power or authority on the part of the Commission to compel respondent to furnish the petitioner with gas. The Commission held that it had jurisdiction, and ordered the case to proceed to a hearing upon the facts in order that the respondent might, if it could, show any good reason

why the Commission should not require it to supply gas to the petitioner upon the same terms and conditions that it supplies gas at the present time to the Attica Natural Gas Company.

Evidence on the part of both petitioner and respondent has been taken which shows —

First: That the petitioner, the Attica Water, Gas and Electric Company, is at the present time engaged in supplying natural gas to about forty customers in the village of Attica, and that it produces from its own wells the gas which it is furnishing to its customers.

That it charges these consumers at the present time 50 cents per thousand feet.

That in the Autumn of the year 1911 it had 202 gas customers but since that time it has lost all but the 40 named, the others for the most part having been taken over by the Attica Natural Gas Company.

That the Attica Water, Gas and Electric Company uses a considerable amount of natural gas as fuel to generate steam in producing electricity which it sells to its customers in the village of Attica.

That its wells at the present time produce gas in quantity sufficient to supply fuel for its engines used in generating electricity or sufficient in quantity to supply the 40 gas customers on its distributing pipes, but not enough for both purposes.

That the supply from its wells is diminishing with considerable rapidity and that there would not be enough gas at the present time to supply the demand for use in distribution to customers should it get back the full number of 202 customers which it had in the Autumn of 1911.

That it formerly sold gas to its consumers at about \$1 per thousand feet, but that since December, 1911, its price has been 50 cents per thousand feet.

Second: That the Attica Natural Gas Company is a corporation engaged in the distribution of natural gas in the village of Attica.

That it formerly sold gas at about \$1 per thousand cubic feet, but since December, 1911, it has sold it at 50 cents per thousand feet.

That the Attica Natural Gas Company and the Attica Water, Gas and Electric Company are competitors for the business of supplying natural gas to the inhabitants of the village of Attica and have been such for several years.

That the Attica Natural Gas Company did on or about the 1st day of November, 1911, enter into a contract with the respondent, the Alden-Batavia Natural Gas Company, by the terms of which the Alden-Batavia Gas Company, the respondent herein, covenants and agrees to sell and deliver to the Attica Natural Gas Company for and during the period of ten years from the 1st day of November, 1911, such portion of the surplus natural gas which may be produced from wells now drilled or that may hereafter be drilled upon lands owned or leased by the Alden-Batavia Natural Gas Company, as the Attica Natural Gas Company may need and require to supply its customers and carry on its business in the village of Attica, N. Y., and vicinity, for the sum or price of 30 cents per one thousand cubic feet, meter measurement, calculated on the basis of ten ounces to the square inch; to deliver said gas on the village line of Attica, N. Y., where the Attica Natural Gas Company agrees to receive it and pay therefor the sum of 30 cents per thousand cubic feet for gas in amounts which the Attica Natural Gas Company may need and require to supply its customers and carry on its business in the village of Attica and vicinity. The contract further shows that the gas sold and delivered under it shall be delivered at a pressure of not less than forty pounds to the square inch, and that the contract may be canceled and annulled by either party thereto on giving the opposite party three months' notice in writing of its intentions so to do.

That in pursuance of the terms of said agreement the respondent, the Alden-Batavia Natural Gas Company, is at the present time supplying natural gas to the Attica Natural

Gas Company which it in turn is selling and distributing to its customers in the village of Attica.

The petitioner in this case asks that the respondent be ordered to make a similar contract with it: that is, that it shall be ordered to deliver to it, from respondent's surplus, gas at 30 cents per thousand feet under the conditions named in the contract hereinbefore set forth.

As its reasons for refusing to comply with this demand the respondent first recurs to the objections raised on the first hearing herein, and asserts that the petitioner has no standing before this Commission and can not invoke its powers because it is a foreign corporation and did not prove on the hearing that it has a license from the Secretary of State of the State of New York to do business in this State.

We do not think these objections are of force. Respondent's counsel in his brief has cited a number of cases tending to show that actions at law may not in certain cases be maintained by foreign corporations which have not taken out the license referred to, and that the organization of the petitioner under the laws of West Virginia is for a combination of purposes not permitted by the laws of this State, and that therefore the company has no right to operate within this State.

These authorities would not seem to govern in a proceeding like the present one brought before this Commission. The petitioner is admittedly a corporation, and it is actually at the present time serving gas, water, and electricity in the village of Attica. It has or has had contracts with the Village both for gas and for electricity. It is a public service corporation and reports to this Commission as such. It has placed in evidence chapter 35 of the laws of 1880 (passed February 28, 1880), by the terms of which it was made "lawful for the Attica Water Company to purchase, hold, operate, and maintain the gas works, pipes, fixtures, machinery, and real estate used in connection therewith now in the village of Attica, Wyoming county, N. Y.: to extend and enlarge the same within the bounds of said

village as shall be approved and determined upon by a majority of the trustees or directors of said Water company". This act further provides that "upon the purchase being made according to the provisions of the act the corporate powers of the Attica Water Company shall be and they are hereby enlarged so as to embrace the objects and purposes of this act".

The Attica Water Company is the predecessor of the petitioner, and deeds of conveyance from it to the petitioner were placed in evidence showing transfer to the petitioner of all the property and franchises of the Attica Water Company. The petitioner has for a long time been engaged in the gas business in the village of Attica and occupying the streets of that village. If its right lawfully to be there is denied, the matter should be contested in some forum other than this Commission, which has no jurisdiction in this proceeding to determine the rights of the Attica Water, Gas and Electric Company in the premises.

Besides that, the petitioner herein alleges in its petition that it has a license to do business in the State of New York obtained from the Secretary of State, and although no copy of such license was put in evidence upon the hearing an examination of the files in the office of the Secretary of State shows that such license has as a matter of fact duly issued.

The respondent argues that the making of the contract between it and the Attica Natural Gas Company has resulted in reducing the price of gas to the public from \$1 per thousand to 50 cents per thousand, and that the action of the petitioner in asking for a similar contract will in some manner "exclude or impede competition".

We fail to see the force of this contention. The result of the obtaining by the petitioner of a contract similar to that of the Attica Natural Gas Company would be to enable it to compete with the last named company in selling gas, and the rate to the consumer might possibly go as low as 30 cents per thousand, the cost of the commodity to each competitor. Such

a rate war would be undesirable but it would undoubtedly result in temporary advantage at least to the consumer. It is not to be encouraged, and would not be were this a case of an application on the part of a new company to enter the field. It must be remembered, however, that in this case the rival companies are now in existence and in competition, and that the favorable contract of one is likely to crush out the life of the other so far as gas service is concerned. The evils attendant upon a rate war are already present and acute so far as the petitioner is concerned. It has lost most of its gas business since this contract went into effect and seems likely to lose it all in the near future.

The final objection raised by the respondent is that it has no surplus gas with which to supply the petitioner and could not comply with petitioner's request without running the risk of a shortage to its present customers.

A sufficient answer to this objection might appear in the fact that the petitioner is asking merely for the same contract that the Attica Natural Gas Company now has: viz. an agreement, revokable at three months' notice by either party, to furnish the petitioner, *out of its surplus gas*, natural gas at 30 cents per thousand, to be delivered at a pressure of forty pounds per square inch. If there be no surplus gas, the contract by its own terms becomes nugatory and the situation of the petitioner in that event is no better and no worse than that of its competitor, the Attica Natural Gas Company. In any event, if the respondent should hereafter deem the contract prejudicial to its interests either in respect to its customers or otherwise, it could on three months' notice cancel both contracts, although it must be admitted that the reasons to be given for such cancellation would probably have to be such as to satisfy this Commission of their cogency.

Aside from this view of the case, however, it must be borne in mind that the present application is not for an amount of gas necessary to supply an *additional* territory. The respondent has already contracted (subject to the condi-

tions above set forth) to supply to the Attica Natural Gas Company such gas as the latter company "may need and require to supply its customers and carry on its business in the village of Attica and vicinity". This means that respondent has already agreed, under the limitations named, to furnish every person or corporation in Attica and vicinity who may apply for natural gas with sufficient gas to meet his requirements. It is apparent that whatever consumers the petitioner may hereafter obtain will be taken from actual or potential consumers of the Attica Natural Gas Company and vice versa, and the same proposition is true of any future consumers obtained by the Attica Natural Gas Company. In either event the *total number* of consumers is the same. It is merely a question of which distributing company takes them on. We can not see how the total draft upon the respondent's supply of surplus gas can be in anywise affected by granting the petitioner's demands. The respondent must always have ready at forty pounds pressure enough for everybody in the village of Attica and vicinity and it can make no difference to it who distributes it.

The petitioner has stated that it does not intend to serve gas elsewhere than in this particular territory, and it is not shown or understood that it desires gas for distribution in any other locality. It may be said that the obtaining by the petitioner of a contract similar to that of the Attica Natural Gas Company, by which it may obtain gas at 30 cents per thousand feet, will put the petitioner in a position to inaugurate a rate war, and that the usual consequence, disastrous to the competitors and to the public, will ensue. This, as has been stated, might be a good reason for refusing to a new company permission to go into the Attica territory, but with both companies now there and in active rivalry it is not to be presumed that the competition will be more keen in the future than it has been in the past when the sources of supply from local wells owned by each have been, so far as can be judged from the evidence, practically

similar. To urge this objection at this stage in the proceedings is to urge it solely against the petitioner, who must go out of business and lose its investment in its gas distributing system if it can not obtain gas on an equal footing with its competitor.

The respondent produced considerable evidence to show that it could not with safety and in justice to its present customers take on any more consumers.

Disregarding for the moment the point to which attention has been above called, namely that no additional draft is actually to be made, we shall consider the force of this evidence in supporting the contention of the respondent.

It was shown that during the months of January and February, 1912, owing to the low temperatures prevailing for a considerable time during those months, it became necessary for respondent to notify some of its largest consumers that they must discontinue the use of gas temporarily, and this was followed by a shut-off at the Johnston Harvester Works at Batavia and the Glass Factory at Alden for a period lasting several days, the exact term of which is not stated. Respondent's manager testified that with these exceptions the company had enough gas to run its low pressure system all last winter. It is a matter of common knowledge that the weather conditions in Western New York during the months named, so far as they concerned continuous low temperatures, were exceptional. A chart of the pressure of respondent's whole system for February 10, 1912, was put in evidence, and shows that on that day the pressure went down to ten pounds although all the wells of the company were drawn upon to keep it up. The respondent was asked to produce similar charts showing the pressure on days other than February 10th. It has so done, and the Commission has before it the pressure record of each day from January 1, 1912, to March 20, 1912. An examination of these charts shows that the minimum pressure fell below sixty pounds on five days only during this period, namely:

	<i>Minimum</i>	<i>Maximum</i>
February 9	34 lbs.	93 lbs.
February 10	10 lbs.	Not stated
March 2	45 lbs.	117 lbs.
March 6	56 lbs.	130 lbs.
March 11	57 lbs.	127 lbs.

It further appears from an examination of the chart that a pressure of sixty pounds and over has always existed for 93 per cent of the time between January 1 and March 20, 1912. On two days only, viz. March 9th and 10th, has the pressure gone below forty pounds, which is the pressure named in the contract at which gas is to be delivered to the Attica Natural Gas Company; and during 93 per cent of the severest portion of the year the minimum pressure has been twenty pounds above the stipulated figure. Respondent's manager testified that "our pressure that we are holding to run our plant through would average about forty pounds; we try to avoid going below that point". It is evident that he considered the pressure adequate so long as it kept above forty pounds. It also appeared that the dropping of the pressure below that figure occasionally was not considered serious, for the evidence shows that notwithstanding the fact that the pressure several times went below forty pounds during the winter of 1910-11, as stated by respondent's manager, the respondent in the Summer and Fall of 1911 took on the entire Attica and Alexander territory, the Putnam settlement, and Wyoming village. If it is to be argued that the dropping of the pressure gauge below forty pounds is a danger signal which is controlling and should block the further extension of territory, it may be answered that the respondent itself has in the past years totally disregarded this and has taken on the largest additional field in three years in the face of this warning.

The respondent has at the present time 78 wells that can be used, and on March 22, 1912 (the date of the last hearing), from 15 to 20 of them were not in use, so that approxi-

mately 60 of the wells were furnishing all the gas necessary to supply all customers at that time.

The Commission has had its chief inspector of gas go over the testimony in this case, examine the charts submitted as well as the annual reports of the petitioner, respondent, and the Attica Natural Gas Company. He has made a brief report to the Commission detailing many of the facts hereinbefore given and concludes, as follows:

The evidence discloses the fact that the Attica Water, Gas and Electric Company had 202 gas customers last Fall, and at the time of the hearing all but 40 had been taken away by the Attica Natural Gas Company, and that apparently the latter company was also trying to get these 40. There is not enough data upon which to base computation. However, after reading the evidence and looking at the charts, as a matter of judgment my opinion is that there is no question whatever that the Alden-Batavia Natural Gas Company has enough surplus gas to supply the Attica Water, Gas and Electric Company adequately.

It is the opinion of the Commission that the respondent, the Alden-Batavia Natural Gas Company, should be ordered and directed to enter into a contract with the petitioner, the Attica Water, Gas and Electric Company, for the furnishing of gas substantially upon the same terms and conditions as those contained in respondent's contract with the Attica Natural Gas Company, and to give a connection at the village line to petitioner on or before the 21st day of February, 1913, and to furnish the petitioner on or before that date with gas at such point of connection at 30 cents per thousand feet, on the same terms and conditions as are set forth in the contract between respondent and the Attica Natural Gas Company, which contract was placed in evidence on March 22, 1912, and marked Respondent's Ex. No. 2, with the following exception, to wit:

It appears from the testimony that the petitioner at the present time makes use of gas from its own wells as fuel to generate electricity. Whatever gas is hereafter used for this purpose by the petitioner must be obtained from its own wells or purchased from the Attica Natural Gas Com-

pany at its regular rates. In taking gas used for these purposes the petitioner is a regular consumer and entitled to no consideration other than would be given to any other consumer located in the village of Attica in the same class with itself. Whatever gas is furnished the petitioner by respondent under the order of this Commission must be used for distribution purposes only, and should be separately metered and accounted for through mechanical devices which can be easily and readily installed.

There was some testimony taken and statements made tending to show that petitioner's financial condition was such that security for the performance of the contract should be given by it. If the respondent deems such security necessary, the contract hereinbefore referred to should be guaranteed by adequate and proper security.

An order should be entered accordingly.

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In the Matter of various Complaints against THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY as to its commutation and other passenger rates upon its Hudson and Harlem divisions.

In the Matter of various Complaints against THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY as to its commutation and other passenger rates.

In these cases the Commission holds—

1. A rate fixed and established as a voluntary act of the corporation itself which has been charged and collected by the corporation during a period of time sufficiently long to show that it is not a mere experiment, and has been a rate which the corporation charged and collected as a regular and settled rate which has been accepted by the public in its dealings with the corporation as just and reasonable, under which business affected by the rate has prospered and increased, must as against the corporation be treated as presumptively just and reasonable. It is unreasonable to increase such a rate without a new state of facts which, for some reason, makes the old rate not justly and fairly remunerative to the corporation. Such facts, if they exist, are peculiarly within the knowledge of the corporation. A change having been made by it from a presumptively reasonable rate, the burden lies upon it in the first instance to overcome by evidence the presumption of fact that the increased rate is unreasonable.

2. That as a matter of public policy the rates into New York city from the commuting district should be placed at the lowest reasonable possible point, both in the interests of the public and of the railroads.

3. That the increased rates of both respondents have operated unfavorably upon traffic.

4. That the revenues from the increased rates have not increased above the revenues from the former rates in anything like the increase in rate, showing that the increase tends to restrict travel and brings no sufficient benefits to the railroad company to justify the increase.

5. That in the case of the New Haven company, the tollage and terminal charges paid by it to the Central company for the use of its tracks and terminal facilities in the city of New York are in the nature of rent and a part of the general expense of the company, and can not be allocated to the particular traffic using such tracks and terminal.

Decided January 31, 1913.

Joseph S. Wood for complainants.

C. C. Paulding for respondent The New York Central and Hudson River Railroad Company.

E. D. Robbins for respondent The New York, New Haven and Hartford Railroad Company.

STEVENS, *Chairman*:

For many years The New York Central and Hudson River Railroad Company has given commutation rates and service between its station in New York city and Peekskill upon its Hudson division, and White Plains upon its Harlem division. For an equally long period of time The New York, New Haven and Hartford Railroad Company has given commutation service and rates upon its road between its New York city station and Port Chester near the Connecticut line.

About July 1, 1910, both of these companies increased their commutation and some other rates in the territory named by a very considerable amount stated in terms of percentages. Thereupon various complaints were filed against them alleging that the increased commutation rates thus charged were unjust and unreasonable.

The Commission has fully considered the voluminous proofs, oral and documentary, submitted by both the railroad corporations and the complainants. A concise statement of the reasons for the decisions which it makes in the several cases will be sufficient to cover them all.

The rule which the Commission has uniformly followed in cases of increase of rates charged by a corporation subject to its jurisdiction is as follows:

A rate (1) fixed and established as the voluntary act of the corporation itself; (2) which has been charged and collected by the corporation during a period of time sufficiently long to show that it is not a mere experiment, and has been the rate which the corporation charged and collected as a regular and settled rate; (3) which has been accepted by the

public in its dealings with the corporation as just and reasonable; (4) under which business affected by the rate has prospered and increased, must as against the corporation be treated as presumptively just and reasonable.

It is unreasonable to increase such a rate without a new state of facts which for some reason makes the old rate not justly and fairly remunerative to the corporation. Such facts, if they exist, are peculiarly within the knowledge of the corporation. A change having been made by it from a presumptively reasonable rate, the burden lies upon it in the first instance to overcome by evidence the presumption of fact that the increased rate is unreasonable.

All the foregoing conditions obtain in the present cases, except that numbered (3) with reference to the New York Central. That company increased its commutation rates in the year 1907, and this increase has never been acquiesced in by the public as being just and reasonable.

We think that the respondent corporations have not succeeded by the evidence and arguments presented by them in overcoming the presumption that the increases complained of were unjust and unreasonable.

1. We hold that as matter of public policy the rates into New York city from the commuting district should be placed at the lowest reasonable possible point, both in the interest of the public and of the railroads. The prosperity of the railroads is bound up with the growth and prosperity of the city of New York. The growth of that city is very great, and owing to its situation, its continued growth depends largely upon its ability to expand and the ability of the great mass of the people to find suitable homes. It is of the utmost importance to the public that homes for literally armies of people may be found in the county of Westchester. Every consideration of public welfare demands that that county be given over to the residences of those who earn their livelihood in the city of New York. Without them, the city's work can not be done; and the city itself affords no proper place of

residence for hundreds of thousands except on terms of unwarranted congestion or excessive expense. Public health, public convenience, and public interest in every way require that cheap and rapid transportation be afforded into New York city from points as far out in the country as is practicable, and any policy which makes against this must be disapproved.

From the point of view of the railroads, their prosperity is bound up in the growth and development of New York city. That growth and development are very largely dependent upon affording proper homes, and cheap transportation to and from the same, in the suburbs. The railroad corporations should be prepared to afford this transportation at the lowest possible rates, if they are to consult properly their own financial interests in developing and encouraging the enormous business which the city as a whole gives to them, both freight and passenger.

For these reasons the question really submitted to this Commission is not just how many tenths of a cent the rate can be raised or lowered for each mile of travel, but at what point it should be placed in order to enlarge the commuting business, increase the suburban population, and thereby increase the general prosperity. Of course this point must be fixed with proper reference to the fair and reasonable returns to which the corporation is entitled over and above the actual out of pocket expense involved in performing the service.

2. An attentive study of the evidence submitted satisfies us that the increased rates have operated unfavorably to the communities affected; that they have discouraged travel; that they have not permitted the growth and development of the communities within the commutation zone; and that they have added materially and unjustifiably to the burden of those who are required to travel back and forth daily in order to carry on their business in the city.

3. The Commission is also satisfied from the evidence that the revenues derived from the increased rates have not increased above those received formerly in anything like the proportion of increase of rate. The ostensible reason of the companies for increasing these rates was the increased expense of operation and the necessity for more revenue to meet this increase. This expectation has in a large measure, according to the evidence, been disappointed. The operating costs have not been decreased, but the gross earnings from the commutation rates have not afforded the relief to the companies which they expected from the increase in rates. This is another proof that the effect of the increase has been to diminish travel and not to better the net financial result to the companies. We are convinced that the fares of the companies complained of tend to restrict rather than to promote travel, and to such an extent as to defeat materially the purpose for which commutation fares are primarily established.

4. In the case of the New Haven, that company has based its defense of its increased rates upon tollage and terminal charges paid by it under its contract for the use of tracks and the use of the Grand Central Terminal in New York city to The New York Central and Hudson River Railroad Company. It allocates such charges wholly against the passenger traffic in and out of that terminal, with certain fixed amounts per regular passenger and other fixed amounts for each commutation passenger. By making this allocation it claims to have shown that it is carrying the commutation traffic at a loss, and hence there is no possibility of saying that the rate charged by it is unreasonable.

We are of the opinion that this allocation to the particular traffic handled can not be sustained. Such allocation is against universal practice, and has never been made before, so far as we can discover, by the company itself in any adjustment of rates. The New York Central has to bear the same terminal expenses and also has to bear the overhead expense

connected with the use of its tracks in the commutation zone. It, however, does not appeal to the principle which is urged by the New Haven.

We regard these tollage and terminal charges as being in the nature of rent, and the fixing of the same by the number of passengers carried over the tracks and passing through the station is only a method of measuring the amount of rent paid. In principle, the case is precisely as though the New Haven paid a fixed sum determined arbitrarily instead of a variable sum determined by the number of passengers using the facilities. These rent charges, as they clearly are, must be considered as a part of the general expenses of the road and apportioned upon its entire business, precisely as the charges of maintaining all of its other stations are apportioned. We have never learned that in other cases the expense of maintaining a particular passenger station is allocated to the rate charged the passengers using that station, nor has the New Haven called our attention to any such case. It would be impracticable as an accounting proposition, if carried to its logical conclusion, and would unquestionably operate disadvantageously to travel and business generally. We are unable to see any reason why the general rule should be departed from in this case, although the fact that the rent is determined by the number of passengers using the facilities makes the argument of the company specious.

The foregoing conclusions are the result of much study and consideration. They dispose of the cases and require that the rates be restored to those prevailing before the increase complained of.

These cases have not been free from embarrassing questions. The Commission is not disposed to overlook or minimize the contention of the respondents that the increase in costs of operation arising from increased wages and greater cost of materials should be reflected in rates. It should not be forgotten that the increased costs claimed by the respon-

dents arise largely from the alleged increased cost of moving trains by electric energy. The Commission feels that, assuming some such increased cost to have been shown, there should be taken into consideration in connection therewith that the change from steam to electricity as a motive power has made possible the utilization of the site of the Grand Central Terminal for other purposes, and to an extent that may well pay an adequate return upon the cost of the station itself. It is a serious question, to be determined only by future developments, whether the use of electric energy is not the only possible method of economical operation in a city like New York; and whether it will not, all things considered, justify the continuance of the former rates rather than an increase of the same.

There is another matter of large importance in the case of the New Haven. It has at very great expense built and put in operation the New York, Westchester and Boston railroad as far as New Rochelle. It contemplates a completion of that line to Port Chester as soon as the work can reasonably be performed. When that road is completed to Port Chester, if it makes such connections and arrangements in New York city as to enable it to furnish a service as convenient and adequate as that which the New Haven now furnishes into the Grand Central Terminal, a question will at once arise whether the New Haven may not justly seek by all reasonable means to divert traffic from its main line to its subsidiary, the New York, Westchester and Boston, and thereby reduce its terminal expenses and increase its returns upon its subsidiary investment. If it were assumed that the company might justly so do, always keeping in mind that the service must in every respect be convenient and adequate, still until that road is completed to Port Chester, and proper subway connections are made, the question can not arise for determination.

In the Matter of the Complaint of BUFFALO GAS COMPANY
against CITY OF BUFFALO.

Buffalo Gas Company is a domestic corporation engaged in generating, distributing, and selling manufactured gas in the city of Buffalo. For years it has supplied the City with gas from its mains for street lighting and for lighting in municipal buildings. About 20 per cent of its entire product is supplied to the municipality for these purposes. Prior to March 1, 1907, there was a contract between the Company and the City fixing the price. The contract expired at that date, and since then no contract has existed.

The Company claims that a reasonable price for the gas supplied is 95 cents per thousand cubic feet. The City claims such reasonable price to be not more than 60 cents. As the result of certain litigation, the City has been paying 70 cents per thousand on account, without prejudice to the recovery by the Company of a greater sum in appropriate proceedings before a tribunal having jurisdiction of the dispute.

Pursuant to a provision of section 71 of the Public Service Commissions Law, the Company made complaint to the Public Service Commission concerning the price to be charged by it for gas supplied the municipality and asks the Commission to fix such price. The conclusion of its brief is, "We, therefore, respectfully request the Commission to fix the price of the gas consumed by the City at the sum of ninety-five cents per thousand, and to grant reparation for the amount now due from the City to the Company upon that basis".

The City denies that the Commission has any jurisdiction to fix the price of gas delivered before making its order, and alleges that the price fixed by the Commission applies only to gas supplied thereafter.

Held —

1. That the Commission has no power to fix the price to be paid by the City for gas which has been furnished it by the Company prior to its determination, and that such determination relates only to gas thereafter furnished.
2. That the fair and reasonable price per thousand cubic feet of gas delivered to the municipality is the sum of 90 cents.
3. That in this proceeding the Commission can not fix the price for gas to private consumers, neither party having asked any such relief.

The opinion discusses —

a. The organization and history of the Company and its constituent companies, it having been created by a consolidation of other companies;

b. The original cost of its physical properties;

c. The cost of reproduction new of such properties;

d. The history of the People's Gas Light and Coke Company and the acquisition of the greater part of its stock and bonds by the Buffalo Gas Company;

e. The property used by the Company in the public service;

f. Working capital;

g. The effect to be given to competition by natural gas;

h. The importance of correct unit prices in endeavoring to ascertain the cost of reproduction new, and other incidental questions bearing on the final result;

i. Whether the cost of cutting paving laid over the mains by the City, subsequent to the actual laying of the mains, can be considered as a part of the fair value of the property of the Company for rate making purposes.

Held that such cost could not be so considered.

Decided February 4, 1913.

Louis L. Babcock for Company.

Clark H. Hammond for City.

STEVENS, *Chairman*:

The Buffalo Gas Company is a domestic corporation having its plant and conducting its operations in the city of Buffalo. It supplies manufactured gas to the City and to such private consumers as may desire its product.

About 20 per cent of its product is taken by the City of Buffalo for street lighting and for lighting in municipal buildings. Prior to March 1, 1907, there was a contract subsisting between the City and the Company for the furnishing of gas for street lighting and other purposes, such contract by its terms covering a five year period between March 1, 1902, and March 1, 1907. Since March 1, 1907, no contract has existed between the City and the Company.

The price to be paid by the City for gas was fixed by the contract, as follows: For the year ending March 1, 1903, 79 cents per thousand cubic feet; for the year ending March 1,

1904, 78 cents per thousand cubic feet; for the year ending March 1, 1905, 77 cents per thousand cubic feet; for the year ending March 1, 1906, 76 cents per thousand cubic feet; and for the year ending March 1, 1907, 75 cents per thousand cubic feet.

It was, however, agreed that in case in any year from and after March 1, 1904, the entire consumption of gas by the City should equal or exceed 107,000 thousand cubic feet, the Company should refund to the City any and all moneys which it should receive in excess of the sum of 75 cents per thousand cubic feet in any such year, and that the City should not be required to pay during the year beginning March 1, 1905, a larger sum than would result from the consumption of 107,000 thousand cubic feet of gas at the rate of 75 cents per thousand cubic feet, in case any smaller or less consumption at the regular higher rate above provided for that year would exceed such sum so computed on the basis of the consumption of 107,000 thousand cubic feet.

During the existence of the former Commission of Gas and Electricity, complaint was made by the City against the Company on account of its rates, which proceeding resulted in a decision by said former Commission on or about the 29th day of June, 1907, fixing the price of gas to all consumers of the Gas company in the city of Buffalo at the rate of 95 cents per thousand cubic feet, which rate, by the terms of the decision, was to become effective in September, 1907. Subsequent thereto, the Court of Appeals held the act under which such Commission acted to be unconstitutional, and for that reason said determination has never been considered or treated as legally binding upon either the City or Company. For a considerable period after the making of this decision the City, although consuming gas, declined to make any payments whatsoever for the same to the Company, the price being in dispute. Finally, in default of such payment, the Company threatened to cut off the supply of gas from the street lights; and the City thereupon, on or about

the 10th day of September, 1908, commenced an action against the Company in the Supreme Court. The complaint demanded judgment that the reasonable value of the gas supplied by the Company to the City from the 1st day of July, 1907, and that the amount due from the City to the Company be fixed and determined by the court, and that the defendant be required to accept the sum so fixed and determined; enjoining the Company from discontinuing the supply of gas to the City and requiring it in the future to supply and furnish gas to the City for its purposes at such reasonable value as might be fixed and determined by the court. The City at the same time obtained an injunction restraining the Company from discontinuing or shutting off the supply of gas to the City during the pendency of the action or until the further order of the court. An application was thereupon made to the court by the Company requiring the City to show cause why the injunction should not be vacated and set aside. Thereafter, a Special Term of the Supreme Court granted an order that the motion of the Company to vacate the injunction be denied without costs, upon condition that the City pay to the Company within ten days from the date of entry and service of the order a sum equivalent to 75 cents per thousand cubic feet for gas used by the City since July 1, 1907, such payment to be without prejudice to either party to the suit to establish any other sum as the reasonable value of such gas; and in the event the City should fail to make such payment, that an order might be entered at the expiration of the ten days vacating the temporary injunction granted to the City. The City thereupon appealed to the Appellate Division of the Supreme Court, which, after argument, modified the decision of the Special Term by fixing the price which the City should pay as a condition of keeping the injunction alive at the sum of 70 cents per thousand cubic feet.

Thereafter the City paid to the Company the sum of 70 cents per thousand cubic feet for gas supplied to it subse-

quent to July 1, 1907, and is now paying for the gas which it consumes at that rate. This sum has been accepted by the Company under protest, it claiming that the fair and reasonable value of such gas is the sum of 95 cents per thousand cubic feet. The controversy between the City and the Company therefore is —

1. What the price shall be for all gas hereafter supplied by the Company to the City;

2. Whether the reasonable value of the gas supplied to the City since July 1, 1907, is in excess of the sum of 70 cents per thousand cubic feet; and if so, how much in excess.

The action brought by the City has never been brought to trial.

Availing itself of a provision of section 71 of the Public Service Commissions Law, the Company makes complaint against the City of Buffalo concerning the price to be charged by it for gas furnished to the City of Buffalo, and alleges that that price should be at least the sum of 95 cents per thousand cubic feet, which sum it alleges to be reasonable. It further alleges that the City was, at the time of filing the complaint, justly indebted to it for gas theretofore delivered in the sum of upward of \$124,000, which sum the City has refused to pay although requested so to do.

The prayer of the complaint is that this Commission “forthwith investigate into the above allegation and matters hereinbefore set forth in this complaint, and that a hearing be had thereon; and that after such hearing and upon such investigation that may be made by said Commission within the limits prescribed by law, that this honorable Commission fix the price which this complainant ought reasonably to receive from the City of Buffalo for its product; and that the complainant have such other, further, or different relief in the premises as may be proper”.

It would seem from the general frame of the complaint and the prayer for relief, that in addition to fixing a price for gas to be paid by the City in the future, the Company

desires to have this Commission fix the price which the City shall pay for gas delivered since July 1, 1907, and which amount is in dispute as above set forth. In its answer, the City denies that this Commission has any jurisdiction to fix the price for gas delivered before the making of its order in the proceeding, and alleges in substance that the jurisdiction of the Commission is confined to fixing the price for gas delivered after the final determination of the Commission.

Subdivision 5 of section 66 of the Public Service Commissions Law provides —

Whenever the Commission shall be of opinion, after hearing had upon its own motion or upon complaint, that the rates or charges of any such corporation are unjust, unreasonable, unjustly discriminatory or unduly preferential or in anywise in violation of any provision of law, the Commission shall determine and prescribe the just and reasonable rates and charges *thereafter* to be in force for the service to be furnished, notwithstanding that a higher rate or charge has heretofore been authorized by statute.

Section 72, which prescribes what shall be done subsequent to the making of the complaint under section 71, provides —

After a hearing and after such an investigation as shall have been made by the Commission or its officers, agents, examiners or inspectors, the Commission, within lawful limits, may by order fix the maximum price of gas or electricity, not exceeding that fixed by statute, to be charged by such corporation or person for the service to be furnished.

In other places in the statute, language is used which has reference solely to the price to be charged after the determination.

It seems to us clear that the Commission has no power to fix the price to be paid by the City for gas which has been furnished it by the Company prior to our determination, and that the price which we may fix relates only to gas thereafter furnished. Whatever force and effect either the Company, the City, or the courts may choose to or ought to give to our determination as to the reasonable value of the gas heretofore supplied by the Company is not for us to determine.

It is further to be observed that nothing in the complaint or answer justifies the Commission in fixing the price to be charged for gas to private consumers. The complaint is directed solely to the price to be charged to the City of Buffalo as a municipality, and the answer interposed by the City does not in any respect make complaint against the price charged for gas furnished to private consumers. The answer of the City sets forth "that defendant is quite willing that this honorable Commission should fix and determine the price of gas to be charged said City by complainant which is being furnished at the present time, and so far as practicable to determine and fix the value of such gas for the future; that defendant alleges such price to be 70 cents or less per thousand cubic feet; that the defendant have such other, further, or different relief in the premises as may be legal, lawful, just, and proper".

A large number of hearings have been had upon the issues raised by the complaint and answer, about thirty-five hundred pages of oral evidence have been taken, substantially one hundred and fifty exhibits covering several hundred pages have been introduced in evidence, and the matter has been submitted by counsel for the respective parties upon elaborate briefs.

The great bulk of the testimony has been directed to showing the extent and character of the physical plant of the Company, the estimated reproduction cost thereof, and its condition as to depreciation. The final contention of the Company is that the value of its property upon which a return should be computed is the sum of \$7,554,500.

The contention of the City as to the value of the property is somewhat obscure. In the brief submitted by it, the total value of the property is stated to be \$2,376,906. In this brief, however, it does not recognize certain elements of value which are apparently conceded in the evidence. Referring to the evidence alone, there is warrant for saying that the City's contention is that the value amounts to

\$3,085,295. Upon the latter assumption, the difference between the parties as to value is \$4,469,205. Taking the figures given in the brief, the difference in controversy is \$5,177,594.

It is of interest to note what this actually means in terms of price of gas. The Company claims a total value of its property upon which it is entitled to a return of \$7,554,500. Under the decision of the United States Supreme Court in the Consolidated Gas case, a return of less than 6 per cent upon this sum will be confiscation. The rate should, therefore, be fixed at such sum as would enable it to earn 6 per cent of \$7,554,500, or \$453,272. The annual sales of gas of this Company are about 600,000 thousand cubic feet. For the year ended December 31, 1911, the actual sales were 638,550 thousand cubic feet. In order to produce 6 per cent upon the capital, or \$453,270, a price of 71 cents per thousand cubic feet would be required. The claimed operating expenses of the Company are almost exactly 58 cents per thousand cubic feet, which must be added to the 71 cents in order to get the price of gas: and the sum of the two is \$1.29. It is unquestioned that something should be added to the above figures for depreciation, and if this be fixed at one-half of one per cent, it would result in the sum of 6 cents per thousand cubic feet, which added to \$1.29 would make \$1.35. The position of the Company, therefore, is that anything below \$1.35 per thousand cubic feet as a maximum price would be confiscation of its property. At present it is charging \$1 per thousand cubic feet to private consumers, and claims that 95 cents per thousand cubic feet is a reasonable price to the City.

Upon the assumption that the value contended for by the City is \$3,085,295, the return upon this at 6 per cent would be \$185,117, and divided as before by the amount of gas sold, the result would be a price of 29 cents per thousand cubic feet. Adding to this the operating expense of 58 cents per thousand cubic feet, the total price upon this assumption would be 89 cents per thousand cubic feet, or 6

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cents less than that contended for by the Company. If we assume the total value of the property to be \$2,376,900, as stated in the brief of the City, this will require a return of \$142,614. To produce this amount would require a rate upon the sales of 1911 of 22 cents. This added to the operating expense of 58 cents would make a rate of 80 cents.

These figures are given merely to show the range of the controversy between the parties expressed in terms of price of gas per thousand cubic feet.

HISTORY OF CONSTITUENT COMPANIES

The Buffalo Gas Company is a practical consolidation of three preëxisting gas companies which for many years prior to 1897 had been engaged in supplying the City of Buffalo with gas. About October 1, 1897, the stock of all three companies was sold to a syndicate of New York bankers; and thereafter, by various legal proceedings, the three preëxisting corporations became consolidated or merged into the Buffalo Gas Company. The precise steps by which the consolidation was accomplished are not important at this time. The history of the purchase will be given later.

The oldest of the three gas companies was Buffalo Gas Light Company, which was organized on the 26th day of February, 1848, although it would seem that the company had been in business in some form since 1836. Its original capital stock was \$150,000. In 1853 it was increased \$75,000, and later in the same year again increased \$500,000. In 1868 it was increased \$250,000, and in 1871 \$500,000: making a total authorized stock of \$1,475,000. The actual issued capital, however, was only \$1,000,000. In 1872 it sold a portion of its property in the eastern part of the city to the Buffalo Mutual Gas Light Company, and thereupon reduced its issued stock to \$750,000, it having sold property supposed to be worth \$250,000 to the Mutual. In 1874 it sold another portion of its property to the Citizens Gas Company, and the issued stock was further

reduced to \$500,000. In 1887 the capital stock was increased \$500,000, bringing the total amount up to \$1,000,000. Whether this issue of stock was for cash or property, or whether it was a stock dividend, does not appear in the case. What the precise fact is as to this is important, but there seems to be no way of solving it at this time; and therefore in calculations hereafter given it will be assumed that it represented a payment into the company of \$500,000 in cash.

The Buffalo Mutual Gas Light Company was organized November 30, 1870, and the amount of stock issued was \$750,000.

The Citizens Gas Company was incorporated in December, 1873. Originally its capital stock was \$400,000, but in 1876 this amount was reduced to \$300,000.

The time of transfer of the stock of these companies to the syndicate was practically October 1, 1897. At this time the indebtedness of the respective corporations other than floating liabilities was as follows:

Buffalo Gas Light Company.....	\$80,667
Scrip.....	280,000
Buffalo Mutual Gas Light Company, scrip dividend certificates.....	750,000
Citizens Gas Company, bonds and real estate mortgage.....	315,700

From data supplied by the Buffalo Gas Company, there have been constructed balance sheets of these three companies as of September 30, 1897. The following table shows such balance sheets for each company, the last column showing the aggregate of the three companies:

<i>Item</i>	<i>Citizens Gas Co.</i>	<i>Buffalo Gas Light Co.</i>	<i>Buffalo Mutual Gas Light Co.</i>	<i>Totals</i>
Fixed capital.....	\$671,693	\$1,660,440	\$1,525,009	\$3,857,142
Materials and supplies.....	9,228	29,445		38,673
Cash.....	1,178	1,700	111,936	114,814
Bills and accounts receivable.....	2,744	32,648	14,665	50,057
Miscellaneous.....		7,421		7,421
Total.....	\$684,843	\$1,731,654	\$1,651,610	\$4,068,107
Capital stock.....	\$300,000	\$1,000,000	\$750,000	\$2,050,000
Scrip.....		260,000		260,000
Scrip dividend certificates.....			750,000	750,000
Mortgage bonds.....	315,000	80,667		395,667
Deposits.....	7,277	42,410	10,402	60,089
Bills and accounts payable.....	52,929	38,958		91,887
Miscellaneous.....			4,912	4,912
Surplus.....	9,637	309,619	136,296	455,552

It should be clearly understood that the foregoing balance sheets can not be vouched for as strictly accurate, they having been prepared from trial balances placed in evidence which give room, possibly, for some doubt as to the proper classification of some items. There can be no doubt, however, that these balance sheets are approximately correct, and so nearly so as to make the conclusions hereinafter deduced from them sufficiently reliable for the general purposes of this case.

The returns to the stockholders of these several corporations in the form of dividends as far back as the year 1878 have been shown in evidence. The following is a statement of the dividends paid by each company from the year 1878 to 1897, both inclusive:

Buffalo Gas Light Company:

1878 to 1879 inclusive.....	16 per cent
1880 to 1881 inclusive.....	18 per cent
1882.....	15 per cent
1883.....	11 per cent
1884 to 1886 inclusive.....	10 per cent
1897, dividend for six months at the rate of 16 per cent per annum.	

Buffalo Mutual Gas Light Company:

1878 to 1887 inclusive.....	6 per cent
1888 to 1889 inclusive.....	7 per cent
1890 to 1896 inclusive.....	8 per cent
1897.....	14 per cent

Citizens Gas Company:

1878 to 1882 inclusive.....	10 per cent
1883 to 1885 inclusive.....	7 per cent
1886.....	6 per cent
1888 to 1896 inclusive.....	10 per cent
1897, dividend for six months at the rate of 20 per cent per annum.	

October 1, 1897, the Buffalo Mutual Gas Light Company had outstanding what are termed scrip dividend certificates to the aggregate amount of \$750,000. When these certificates were issued does not appear; neither does the evidence disclose the reason of the issue. There is no evidence showing any payment of interest or dividends upon these scrip dividend certificates earlier than 1897, at which time 5 per cent was paid thereon.

The Buffalo Gas Light Company, about 1880, issued scrip to the amount of \$220,245. The reason for this issue does not appear. About 1893 the amount of this scrip was increased to \$260,000. No explanation has been given for this additional issue. From 1880 to 1887 the company paid

7 per cent upon this scrip; from 1888 to 1892 inclusive it paid 10 per cent; and from 1893 to 1896 inclusive it paid 10 per cent. In the year 1897 it paid 7 per cent.

If the correctness of the foregoing data is assumed, reasonably accurate conclusions can be deduced as to the cost of the three plants and how such cost was paid. In reaching these conclusions, in the absence of definite evidence, the state of facts most favorable to the stockholders and the corporations will be assumed. It will therefore be assumed that all of the stock was issued for cash which was fairly and wisely invested in the business. It will also be assumed that all of the scrip dividend certificates and scrip were in fact dividends declared upon the increased value of the assets of the companies occasioned by additions and betterments paid for out of earnings, which additions and betterments were properly capitalizable. It will be assumed that all of the indebtedness of the Company was legitimately incurred and expended upon capital account.

The following table is constructed upon these assumptions:

CAPITAL ASSETS, CAPITAL LIABILITIES, AND SURPLUS, BUFFALO GAS COMPANIES

Constructive figures in even thousands, from trial balances as of September 30, 1897:

Names of company	Fixed capital and materials and supplies	Capital liabilities				Surplus
		Capital stock	Scrip dividend certificates	Mortgage bonds	Total capital liabilities	
Citizens Gas Co.	\$681,000	\$300,000		\$316,000	\$616,000	\$10,000
Buffalo Gas Light Co.	1,690,000	1,000,000		81,000	1,341,000	310,000
Buffalo Mutual Gas Light Co.	1,525,000	750,000	\$750,000		1,500,000	136,000
Totals	\$3,896,000	\$2,050,000	\$280,000	\$396,000	\$3,456,000	\$456,000

Cost of combined properties, as of September 30, 1897:	
Assuming that capital stock and mortgage bonds represent all that was actually expended for plant and equipment	\$2,050,000
Additional cost, assuming that scrip and scrip dividend certificates represent additions to plant paid for in the first instance out of "Income"	396,000
Additional cost, assuming that remainder of capital assets were paid for out of "Income" and are represented by "Surplus"	\$2,446,000
	1,010,000
	\$3,456,000
	\$440,000
	\$3,896,000

It will be observed from the foregoing table that if we assume the cost of the property was represented by capital stock and mortgage bonds alone, such cost was \$2,446,000. If we assume that the cost was represented by capital stock, mortgage bonds, scrip, and scrip dividend certificates, then the total cost was \$3,456,000. If we assume that in addition thereto the cost was represented by the foregoing matters plus the amount of the surplus shown by the balance sheets, the total cost was \$3,896,000. It is impossible from the data submitted in evidence by the Company itself to find that the properties in existence October 1, 1897, had cost more than this latter sum of \$3,896,000.

All of the foregoing data has been obtained from the tables, statements, and information furnished by Dr. A. C. Humphreys, the president of the Gas company. Such information, I understand, was largely derived from data collected by him in the examination of the companies and their property in 1897, as hereinafter detailed. It must be clearly borne in mind that Dr. Humphreys says the books of the constituent companies were not kept alike, and that in part they did not, or some of them at least, observe the distinction between capital account and operating accounts: in other words, that they charged capital expenditures to operating expenses. If this was done to any extent, it necessarily makes uncertain any conclusions which may be drawn from the foregoing tabulations. However, it does not appear that there were ever any credits to the fixed capital of any of these companies on account of retirement or depreciation of fixed capital. Whether there was any proper relation between the capital expenditures charged to operating expenses and the credits which ought to have been made by reason of retirement and depreciation, there is no means of ascertaining. The evidence of Dr. Humphreys upon this point makes the foregoing conclusions somewhat speculative. It may, however, be said that it is not in any degree more speculative or uncertain than the evidence in the case as to the reproduction cost of the existing property.

October 1, 1897, all of the existing generating systems and plants, including land, buildings, manufacturing apparatus, and holders, were in existence; and, so far as appears, no substantial additions have been made to them since that time except the usual changes occasioned by the proper handling of maintenance.

As will be hereafter shown, a very considerable portion of the plants as they existed October 1, 1897, has been thrown out of use. At the present time the system of mains is about 411 miles in length; October 1, 1897, the total length of mains was 345 miles and 756 feet, making a total of addition to the mains since that date of about 66 miles.

Exhibit D-44, furnished by the Gas company and introduced in evidence by the City, shows the net charges to fixed capital account for improvements and betterments from October 1, 1897, to December 31, 1910, omitting the charges to construction for the Pintsch gas plant: the aggregate of these charges is \$543,472.52. Hence, if we assume that the cost of the entire property October 1, 1897, was represented by stock and bonds which amounted to \$2,446,000, adding to this the foregoing sum of \$543,472 we have the total cost of the plant December 31, 1910, \$2,989,472.

If the cost October 1, 1897, was represented in addition to the foregoing by the amount of the scrip and scrip dividend certificates, and was \$3,456,000, as shown by the table, adding to this sum the charges to fixed capital since October 1, 1897, we have the total cost as of December 31, 1910, \$3,999,472. If we add to this sum the surplus of \$440,000 which existed October 1, 1897, we have as the total cost \$4,439,472. It is impossible to deduce from the evidence in this case the cost of the plant except as is hereinbefore shown.

It should be carefully noted that the sum of the fixed capital and materials and supplies carried upon the books of all the companies October 1, 1897, was the sum of \$3,896,000. Whether any credits have ever been made to fixed capital on account of depreciation, obsolescence, or through retirement of plant, does not appear.

If we assume that the scrip and scrip dividends represent additions to the several plants paid for out of income, and also that the surplus was accumulated from earnings not distributed in the way of dividends, and that the income thus not distributed represented by scrip, scrip dividend certificates, and surplus, was invested in fixed capital, we find that the total of them is equal to an additional dividend upon the capital stock of 70.7 per cent; so that in effect, upon this view of the case, in addition to the dividends hereinbefore noted, the stock had earned the stockholders dividends to the amount of 70.7 per cent, all of which they had chosen to invest in the growth of the plants in this form.

We have next to consider the earning capacity of these plants October 1, 1897.

At that time the net price of gas, both to private consumers and the City, was \$1 per thousand cubic feet. The total number of consumers December 31, 1896, was 18,101. The number of street lamps was 5850. The number of miles of street mains was 345.

The following table, prepared and introduced in evidence by the Company, shows the gas sold, the output, the maximum daily output, and the capacity of the works for the three constituent companies for the year 1896:

	<i>Cubic feet</i>			
	<i>Buffalo Gas Light Co.</i>	<i>Mutual Gas Light Co.</i>	<i>Citizens Gas Co.</i>	<i>Totals for 3 companies</i>
Private consumers.....	289,528,700	126,430,800	115,812,000	531,771,500
City lamps.....	54,903,800	22,894,400	12,177,700	89,975,900
City buildings.....	6,249,700	3,835,900	1,615,400	11,701,000
Total sales.....	350,682,200	153,161,100	129,105,100	*632,948,400
Used by company.....	1,293,800	1,250,200	592,500	3,136,500
Unaccounted for.....	34,061,100	17,552,900	22,363,400	73,977,400
Total sent out.....	386,036,900	171,964,200	152,061,000	710,062,100
Maximum daily output...	1,741,000	755,900	738,000	3,234,900
Capacity of works:				
Holders.....	2,336,900	1,000,000	890,000	4,226,900
Retorts.....	2,500,000	900,000	900,000	4,300,000
Purifiers.....	2,000,000	1,100,000	750,000	3,850,000

* Does not quite agree with reports of the companies, which show total sales for 1896 as 633,540,816. Difference probably due to fact that gas used by officers is included in reports with sales, and here included in used by company.

The following table shows the earnings and expenses of the three constituent companies for the year ended December 31, 1896, separately and combined:

<i>Earnings:</i>	<i>Buffalo Gas Light Co.</i>	<i>Mutual Gas Light Co.</i>	<i>Citizens Gas Co.</i>	<i>Totals for 3 companies</i>
Gas sales.....	\$356,661.05	\$153,277.88	\$128,353.81	\$638,292.74
Rents.....	493.99	417.40	141.00	1,052.39
Services.....		120.23	165.23	285.48
Interest, etc.....		4,068.23	1,750.44	5,818.67
Pintch works.....		1,372.26		1,372.26
Total earnings.....	\$357,155.04	\$159,256.02	\$130,410.48	\$646,821.54
<i>Expenses:</i>				
Coal.....	\$93,774.91	\$34,625.28	\$35,699.35	\$164,099.54
Less residuals.....	74,348.93	30,236.60	30,510.86	135,096.39
Net coal.....	\$19,425.98	\$4,811.32	\$5,188.49	\$29,003.15
Labor.....	46,360.94	30,710.71	14,234.74	91,306.39
Purification.....	8,622.92	1,404.70	3,188.04	13,215.66
Repairs.....	18,011.03	2,764.17	2,396.02	23,171.22
Sdy. exp. mfg. and dist.....	15,996.10	5,802.68	13,814.19	35,612.97
Salaries.....	21,357.17	13,306.60	13,542.00	48,205.77
Distribution repairs.....	5,870.44	300.25		6,170.69
Meter repairs.....	2,177.69	1,099.46	1,355.43	4,632.58
Gas stoves.....	21.34	182.12	682.50	885.96
Lamp lighting loss.....	2,134.10	501.06	1,069.37	3,704.53
Legal exp.....	5,470.58	2,125.50		7,596.08
Interest, etc.....	986.22	*445.27	3,345.80	4,777.29
Taxes.....	27,876.52	13,824.82	7,260.23	48,961.57
Total expenses.....	\$174,311.03	\$67,856.02	\$66,076.81	\$308,243.86
Profits: earnings less operating expenses.....	\$182,844.01	\$91,400.00	\$64,333.67	\$338,577.68

* Includes adjustment of \$110.85. The above statement of income and expenses is constructed from data gathered by A. C. Humphreys for his report on these properties made in May, 1897. The report shows the profits as above but does not include a statement of income and expenses such as here given; hence the adjustment to bring into agreement. The books of the Mutual company were kept in such a way as to make it difficult to prepare an accurate detailed statement of income and expenses, but the above is practically correct.

Net price of gas to private consumers in 1896 was \$1 per M cu. ft.

Net price of gas to public lamps and city buildings in 1896 was \$1 per M cu. ft.

Deducting from the profits of each company the amount of its fixed charges so far as they can be deciphered from the evidence and tables, the capital stock of each company for the year 1896 earned the following returns:

Buffalo Gas Light Company.....	17.9 per cent
Mutual, on capital stock and scrip dividend certificates.....	6.1 per cent
Citizens, on capital stock.....	15.2 per cent

It should not be overlooked, in this connection, that natural gas was introduced into the city of Buffalo about 1888; and that therefore at this time, and for eight years previous thereto, the companies were meeting the competition of natural gas.

ACQUISITION OF THE PROPERTIES BY THE SYNDICATE

In 1897 a syndicate of New York bankers desired to acquire the properties of the three companies, and for that purpose they employed Dr. Humphreys to make an examination of the plants, books, and operations of the several companies. Such examination was had; and Dr. Humphreys testifies that he recommended to his syndicate to make an offer, and they did make an offer to the three companies, of \$4,500,000 for the three plants, free of course of all indebtedness. This was the estimate of Dr. Humphreys at the time of the value of the properties to a willing purchaser, based upon their then existing physical condition, earning power, and competitive conditions of natural gas and electricity both actual and prospective.

In some manner, another syndicate of New York bankers, which will be termed the Seligman syndicate, learning of this investigation by Dr. Humphreys, also obtained the privilege of making the same investigation; and the result of this latter investigation was that the Seligman syndicate made an offer for the three properties of \$5,000,000. This aggregate was to be divided between the stockholders of the three companies by taking their stock at a certain premium and then from the aggregate price in each case deduct the indebtedness of the company. The stock was to carry with it only the physical plant, franchises, and materials and supplies. All other assets of the company were to go to the stockholders.

The following is a statement showing the price to be paid for the stock of each company:

Citizens Gas Company, 3000 shares at \$375.00.....	\$1,125,000
Buffalo Mutual Gas Light Company, 7500 shares at \$166.66.....	1,249,950
Buffalo Gas Light Company, 20,000 shares at \$131.25.....	2,625,000
	<hr/>
	\$4,999,950

ORGANIZATION AND CAPITALIZATION OF BUFFALO GAS COMPANY

In addition to the purchase price to be paid by the Seligman syndicate for the stock of the three constituent com-

panies, it seems to have been agreed that the purchasers should put into the new company for the purpose of working capital and making such additions and betterments as might be found necessary, the sum of \$250,000; and it is probable, and will be assumed, that such a sum was actually paid in in cash, and is represented by bonds which were issued.

As hereinbefore stated, the three companies were finally consolidated, by steps which it is unnecessary to enumerate, into the existing company, the Buffalo Gas Company. As the result of these steps the capitalization of the Company emerged as follows, without any investment whatsoever except the \$5,000,000 purchase price and the \$250,000 paid in for working capital and for additions and betterments:

Common stock	\$7,000,000
Mortgage bonds	5,250,000

In other words, the bonds which were taken by the purchasers of the property represented the purchase price and the investment of \$250,000; and the stock was something else, commonly denominated as "water".

The corporation therefore undertook as a part of its financial scheme to get returns upon securities to the amount of \$12,250,000.

As a demonstration of their abiding confidence that the Company was able to and would secure such returns, the directors set up on their books the sum of \$14,331,399 as the value of their plant and securities. They must, however, have met with some slight disappointment, since January 1, 1909, upon being required by this Commission to set up their fixed capital as of December 31, 1908, they placed upon their books the sum of \$12,419,189.47 only for such capital.

The rate of interest upon the bonds was 5 per cent, entailing a fixed charge of \$262,500. If we assume the dividend rate of 6 per cent upon the stock, the gross amount of annual dividend would be \$420,000, and if the stock and bonds were to make returns upon these rates, the amount required

annually for fixed charges and dividends would be \$682,500; while as appears from the earnings and expense statement hereinbefore given, the total revenues, including sales, rents, interest upon investments, and returns from the Pintsch works of the three constituent companies for the year ended December 31, 1896, amounted to the sum of \$646,821.

The total profits of the three companies, as shown by the same statement, for the year 1896 were \$338,577, while the fixed charges alone under the new organization were the sum of \$262,500, leaving only \$76,077 for depreciation and addition to surplus. Assuming fifty years to be the average life of the plant, the annual depreciation would be 2 per cent, and upon the purchase price of \$5,000,000 this would amount to \$100,000 annually.

We may therefore reasonably conclude that the banking syndicate, composed as it was of men of great financial ability and foresight, must have concluded that the competition of natural gas was to be but little feared and that a great field existed in Buffalo for the future development of the gas business.

ACQUISITION OF THE PEOPLES GAS LIGHT AND COKE COMPANY

The rose colored visions of the Seligman syndicate seem, however, to have been rudely disturbed in the year 1898 by the advent upon the scene of one J. Edward Addicks, whose name and fame are too well known to require further mention at this time. Mr. Addicks and his associates, on the 2nd day of November, 1897, incorporated themselves as the Peoples Gas Light and Coke Company. The authorized capital stock of this corporation was \$3,000,000. It acquired the outstanding capital stock of the Queen City Gas Light Company, and on the 24th day of May, 1898, merged that company. The Queen City Gas Light Company was organized in 1893, pursuant to a special act of the generous legislature of that year known as chapter 556 of

the laws of 1893. This last named company, by section one of the act, was authorized "without other or further authority of law or ordinance, to lay and maintain the requisite conductors, mains and pipes through and under the streets, avenues, highways or public places of said city [Buffalo] or any of them under the supervision of the board of public works of said city, and subject to such reasonable restrictions as said board may prescribe".

This sweeping grant of powers and franchise was conferred by the legislature and not by the constituted authorities of the City of Buffalo. Mr. Addicks seems to have been at this time greatly impressed with the possibilities of Buffalo as a town for the development of the gas business; and he, too, was not alarmed by the competition of the natural gas. The Peoples Gas Light and Coke Company proceeded to construct the existing plant at Bradley street in the city of Buffalo, and also laid some mains, the length thereof being about seven or eight miles.

The Seligman syndicate seems to have become greatly excited over the operations of the Peoples Gas Light and Coke Company. They had not learned that the value of the plant is equal to its reproduction cost. They did not understand, owing to their limited experience, that their plant would have just the same value after Addicks' plant was constructed as before, because the reproduction cost would remain precisely the same; and they really believed, although of course mistakenly, that the existence of the Addicks plant would seriously impair the value of their own. They therefore instituted negotiations with Mr. Addicks for the purchase of his properties, and about the time of the consummation of the agreement for such purchase in the Fall of 1898, certain individuals owning or claiming to own stock in the Buffalo City Gas Company, which at that time was the corporate name of what is now the Buffalo Gas Company, brought an action in the Supreme Court to restrain or set aside the purchase of the stock of the Peoples Gas

Light and Coke Company. Certain affidavits used in these proceedings have been introduced in evidence as Exhibit D-49.

The affidavits made and submitted by the Buffalo City Gas Company contain an interesting revelation of the processes of mind of the persons engaged in engineering the deal on behalf of that company. From the affidavit of the engineer of the Buffalo City Gas Company, Mr. Jenkins, it appears that even then a large amount of natural gas was supplied to Buffalo from gas wells in Pennsylvania and was largely used for illuminating purposes. It was then furnished at 27½ cents net per thousand cubic feet. It appears that the price charged by the Peoples Gas Light and Coke Company to the consumers it was then supplying was 80 cents per thousand cubic feet. In order to meet this competition wherever it existed, the price to the consumers of the Buffalo City Gas Company was reduced to 50 cents per thousand cubic feet, the price remaining as before to those consumers who were not within reach of the mains of the Peoples company. Mr. Jenkins' affidavit closes with the statement:

A division of the territory between rival concerns is impracticable for many reasons and the two courses left open for the present are the acquisition of the Peoples Gas Light and Coke Company by the Buffalo City Gas Company on some reasonable terms, or a war of competition which shall end in the survival of the fittest.

Mr. Jenkins, as engineer, had also not learned at this time that the value of the plant of the Buffalo City Gas Company depended upon its reproduction cost.

It appears from the affidavit of Mr. Franklin D. Locke that bonds of the Peoples Gas Light and Coke Company to the amount of \$1,218,000 had been issued to Mr. Addicks in consideration of his transfer of the stock and properties of the Queen City Gas Light Company to the Peoples Gas Light and Coke Company, \$1,000,000 of this amount having been issued and taken for the franchise of the Queen City

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Gas Light Company, the franchise consisting of the privileges conferred by the act of the legislature hereinbefore noted. Mr. Locke was also imprudent enough to fear that the competition of the Peoples company would impair the value of the property of the Buffalo City Gas Company. He says:

But the fact that it [the Peoples Gas Light and Coke Company] can compel the Buffalo City Gas Company to lose a great deal of money is free from any doubt whatever. If a war of prices obtains and the price of gas be lowered as a result of it, it will be impracticable, as I believe, to restore prices for a long time after the war shall be concluded.

How the much dreaded war would affect the value of the Buffalo City Gas Company, except by impairing its earnings, he does not explain.

The deal for the purchase of this property was carried through, with the result that there was issued to Mr. Addicks and his associates for such stock and bonds of the Peoples Gas Light and Coke Company as they then owned, bonds of the Buffalo Gas Company to the amount of \$555,000 and debentures to the amount of \$1,630,000. Since that time there have been issued for the acquisition of other stock and bonds held by other parties, preferred stock to the amount of \$83,000. Debentures issued to Mr. Addicks have also been converted into preferred stock of the Buffalo Gas Company, so that the securities issued by the Buffalo Gas Company for practically all of the stock and bonds of the Peoples Gas Light and Coke Company are: Bonds \$555,000, and preferred stock \$1,713,000.

It is interesting to note in this connection, that in the progress of this case the Buffalo Gas Company has had the physical properties of the Peoples Gas Light and Coke Company appraised, and that the estimate of the total reproduction cost of such properties, including land values, buildings, manufacturing apparatus, holders, and mains, is in the neighborhood of \$500,000.

The properties of the Peoples Gas Light and Coke Company have been leased to the Buffalo Gas Company and are

used to an extent hereinafter to be discussed in the operations of the lessee.

ANALYSIS OF CLAIMS OF COMPANY AND CITY AS TO REPRODUCTION COST NEW OF THE COMPANY'S PROPERTY

The evidence as to the original cost of the Company's property is not to be regarded as satisfactory. We are next required, if we follow the rule laid down in *Smyth vs. Ames*, to ascertain, so far as we are able, the reproduction cost new thereof. To this question nearly all the evidence submitted on either side was directed, and the briefs are directed in the main to the same matter.

It should be stated that both the Company and the City are exceedingly inconsistent in their treatment of the weight that should be accorded to reproduction cost new in the disposition of the case. As to some matters, it is regarded by both as absolutely determinate of value; as to others, it is ruthlessly rejected.

It is incumbent upon the Commission to ascertain first, if it can, such reproduction cost, and later to discuss what use should be made of it in the determination of the case. An examination of the evidence for the purpose of ascertaining such cost must not be taken as an indication that such cost is equivalent to value. That question will be examined later.

In determining such reproduction cost, both parties recognize to a greater or less extent the division of the property into the two general classes of tangibles and intangibles. Tangibles are, generally speaking, the cost of the labor and materials entering into construction. Intangibles are expenses properly and necessarily incurred in constructing and developing the property and its business upon which it is legitimate to demand a return from the public but for which there is no physical object to show as the direct result of the expenditure. The differences between the parties as to the proper treatment to be accorded to intangibles and

what should be allowed therefor are so great as to require an analytical presentation of their respective positions in this behalf with respect to the various classes of property involved. The following table compiled from the briefs submitted is such a presentation, and a study of its details will show the great number of facts as to which there is wide disagreement.

COMPARISON OF BUFFALO GAS COMPANY AND CITY OF BUFFALO SUMMARIES OF VALUATION OF PROPERTY

	<i>Buffalo Gas Company valuation present value</i>	<i>City valuation present value</i>	<i>Difference present value Company exceeds City</i>
1 Real estate.....	\$586,418	\$151,208	\$435,210
2 Buildings.....	346,108	116,066	230,042
3 Manufacturing apparatus and holders:			
Genesee Street works.....	\$406,770	\$227,438	.....
Forest Avenue holder station.....	98,690	Nothing	.....
East Ferry Street holder station.....	64,600	39,399	.....
Elk Street holder station.....	120,216	Nothing	.....
Elk Street dismantled apparatus.....	8,300	Nothing	.....
Peoples works.....	287,172	132,033	.....
Tools and implements.....	10,042	10,042	.....
Assumed water gas plant at Genesee street.....	Nothing	79,360	.....
Total value of apparatus and holders.....	\$995,790	\$488,272	\$507,518
4 Street mains:			
Street mains (no paving).....	\$1,849,324	.....	.....
Re-paving over mains.....	1,004,975	.....	.....
Total value of street mains.....	\$2,854,299	\$1,356,511	\$1,497,788
5 Services:			
Services (no paving).....	\$558,845	.....	.....
Re-paving over services.....	301,589	.....	.....
Total value of services.....	\$860,434	\$146,152	\$714,282
6 Meters.....	\$175,052	\$103,239	\$71,813
7 Office furniture and fixtures.....	7,300	4,380	2,920
8 Stable equipment.....	13,449	10,448	3,001
9 Working capital.....	150,000	.....	.....
10 Taxes during construction.....	64,107	.....	64,107
11 Liability and casualty during con- struction.....	52,316	.....	52,316
12 Legal and organization expenses.....	61,052	.....	61,052
13 Cost of capital.....	1,088,175	.....	1,088,175
14 Going value.....	300,000	.....	300,000
Total value of property exclusive of franchise.....	\$7,554,500	\$2,376,906	\$5,177,504

REPRODUCTION COSTS

Land:

The following table shows the various parcels of land owned by the Company upon which it claims a return.

There is another parcel at Katherine street owned by it to which some attention was given during the hearings. The Company, however, disavows any claim for a return upon this property for the reason that it is not used in the public service. The table shows the values given by various witnesses sworn by the Company and by the City. It will be noted that the difference between the lowest witness for the City and the highest for the Company is something upward of \$110,000.

Parcel	City		Company	
	Goods	Parke	Griffin	Mahoney
Genesee, Jackson, and Fourth.....	\$126,000	\$117,510	\$200,000	\$200,000
Erie canal, lot adjacent, above.....	45,800	31,058		
	\$171,800	\$148,568		
Elk street (Mutual Co.).....	47,000	45,665	50,000	54,000
Georgia street (Citizens Co.).....	47,970	47,980	56,125	56,125
East Ferry street (holder).....	23,750	24,535	24,000	24,000
Forest avenue (holder).....	76,744	81,554	125,000	112,000
Forest avenue (coal yard).....	14,465	21,075	25,000	21,070
	\$381,729	\$369,407	\$480,125	\$467,195

All of the land at the Genesee Street plant should be treated as in the public service. The contention of the City that a certain parcel next to the canal is not in the public service should not be allowed. It is not in fact used at this moment, but it is directly adjacent to the generating plant of the Company, and with any growth in the business would undoubtedly be needed; and justice and fair dealing do not allow for a moment the quantity of land to be scaled down to the lowest point possible under present circumstances. The Company is fairly entitled to a reserve of land of this character at this location.

The Elk Street property was the site of the former generating station of the Mutual company. Since this property was acquired no use of it has been made in the manufacture of gas, at least not for a dozen years. All of the manufacturing apparatus was taken out and removed, some of the buildings have been torn down; and at the present time nothing is being here used in the public service except the holder and boiler house connected therewith. Some of the other buildings upon the property are rented, and there

is no reasonable ground for assuming that more than a portion of this property is used in the public service. There is no proof in the case that would warrant holding the land for future use in the public service. The holder now in use seems to be ample for that part of the city, and there is no evidence that under any contingency the Company would think of constructing a new generating plant upon this property. The allowance of one-third of this property as being in the public service for a holder station is liberal.

At East Ferry street there are $5\frac{1}{2}$ acres of land. The only use it has in the public service is that of a holder station; $5\frac{1}{2}$ acres for this purpose is not shown by any evidence in the case to be warranted. As a matter of fact, but a portion of this land is used for that purpose; and there is no evidence showing that more will be required for public use within a reasonable time in the future or in fact at any time. An allowance of one-half of this land as being in the public service is liberal to the Company.

At Forest avenue there are two parcels of land separated by the tracks of the New York Central railroad. The smaller tract is rented for and used as a coal yard and has no connection whatever with the public service. A considerable portion of the larger tract next to the water is not in fact used in the public service at the present time. The holder and enginehouse are situated at one end of the lot, and some small cheap buildings at the other end which are not used for gas purposes. Owing to connection with the street, location of piping, etc., it is believed that it may not be unreasonable to treat the whole tract as being in the public service.

As to the values to be attached to these various parcels of land, the Commission is better satisfied with the evidence given by the City than that offered by the Company. It believes that the witnesses called by the City reached a fairer and more equitable conclusion upon these matters than those called by the Company. It is accordingly disposed, after having viewed all of the land and endeavored to inform itself

as to the weight of evidence as best it could, to follow the values claimed by the City. The following table shows the name of each parcel, the value of the entire parcel, the part used in the public service, and the value of the part in the public service. It will be seen that the total value of the land in the public service is \$259,054.

<i>Parcel</i>	<i>Value</i>	<i>Used in public service</i>	<i>Value of part in public service</i>
Genesee Street plant.....	\$150,000	All	\$150,000
Elk street (Mutual Co.).....	46,500	1/3	15,500
East Ferry street (holder).....	24,000	1/2	12,000
Forest avenue (holder lot).....	81,554	All	81,554
	<u>\$302,054</u>		<u>\$259,054</u>

The lot at Georgia street formerly owned by the Citizens company is now a vacant lot and is not used in the public service.

The land owned by the Company, no part of which is used in the public service, is as follows: Lot at Georgia street formerly owned by Citizens company; coal yard at Forest avenue; and lot at Katherine street.

Buildings:

The Company owns 30 buildings upon which it claims to be allowed a return. There is the usual discrepancy between the reproduction costs claimed by the City and the Company. It is unnecessary to review these discrepancies at length or even to state them. The witness Byers, produced by the Company, made a careful estimate of the cost of each of these buildings and has submitted in evidence a detailed estimate showing quantities and unit prices. In the judgment of the Commission, it is the most reliable evidence which was given and that which it ought to follow in view of the examinations made by all the other witnesses and their methods of reaching conclusions. The estimate of Mr. Byers is therefore adopted in the main. The exceptions are as follows:

At the Genesee Street property there is a brick dwelling house which is not used for the purposes of the Company. It is in possession of a tenant and the Company receives rent

therefor. No reason is perceived why it should be treated as a portion of the gas plant.

At the Forest Avenue station there are two buildings designated as building No. 1 and building No. 2, which are not used in the service of the public. The same is true of the house and wagon shed at Ferry street.

At the Elk Street property none of the buildings is in the service of the public nor has been for 12 years, as we understand the evidence, except the boiler house. All of these buildings except this boiler house should therefore be excluded.

The fences at Elk street are estimated by Mr. Byers at \$924. Applying the same rule here as to the land, the cost of the fences should be \$300. It is too small a matter upon which to spend much time.

The following is a list of these properties, and the cost given by Mr. Byers and that adopted by the Commission:

<i>Buildings</i>	<i>Cost</i>	<i>Cost allowed</i>
<i>Genesee street:</i>		
1 Office.....	\$19,536	\$19,536
2 Adjoining office building.....	6,211	6,211
3 Coke shed.....	12,052	12,052
4 Frame coal shed.....	13,855	13,855
5 Stable and shed.....	12,405	12,405
6 Brick residence.....	3,603	.....
7 Governor house.....	319	319
8 Ammonia house.....	6,669	6,669
9 Tower.....	2,010	2,010
10 Tar separator.....	4,078	4,078
11 Purifying house.....	31,598	31,598
12 Retort house.....	58,051	58,051
13 Brick stack.....	2,279	2,279
14 New shed.....	1,537	1,537
15 Coal shed.....	12,098	12,098
16 Meter room.....	1,647	1,647
17 Boiler room.....	2,070	2,070
18 Fences.....	802	802
<i>Forest avenue:</i>		
1 Boiler house.....	8,690	8,690
2 Building No. 1.....	6,177	.....
3 Building No. 2.....	3,204	.....
<i>Ferry street:</i>		
1 House and shed.....	2,279	.....
2 Wagon shed.....	3,336	.....
3 Boiler house.....	2,991	2,991
<i>Elk street:</i>		
1 Brick building (office), old engine room.....	9,457	.....
2 Frame barn.....	924	.....
3 Brick coke house.....	7,855	.....
4 Fences.....	924	300
5 New enginehouse.....	4,927	4,927
6 Brick coal sheds.....	18,324	.....
Total allowed.....		\$204,125

The above does not take into consideration any depreciation. That will be considered later.

Manufacturing Apparatus:

The following is a statement of the reproduction cost new of the manufacturing apparatus submitted by the parties respectively.

<i>Genesee Street Plant:</i>		<i>Company</i>	<i>City</i>
<i>Apparatus</i>			
Benches	.....	\$84,290	\$72,160
Drawing machines	.....	5,290	
Exhausters	.....	7,430	7,500
Tar extractors	.....	7,650	6,330
Surface condensers	.....	4,360	5,162
Rectangular condensers	.....	8,040	
Six multi-tubular condensers	.....	10,550	9,061
Tower scrubber	.....	5,420	
Rotary scrubber	.....	15,940	14,400
Purifiers	.....	32,390	28,800
Station meters	.....	16,590	7,750
Boilers and accessories	.....	10,310	6,355
Governors	.....	2,730	2,447
Tar and liquor tanks	.....	8,180	6,918
Ammonia concentrators and tanks for strong liquor	.....	8,010	6,000
Scales	.....	2,220	1,890
Pumps	.....	1,890	1,885
Yard connections	.....	20,670	17,104
Railroad spur	.....	1,070	1,395
Small piping	.....	3,530	3,530
Tar pipes and drains	.....		1,027
Laboratory equipment	.....	600	600
Gauges	.....		400
Total apparatus	.....	\$257,160	\$200,704
<i>Forest Avenue Station:</i>		<i>Company</i>	<i>City</i>
<i>Apparatus</i>			
Boilers	.....	\$2,180	\$1,530
Exhausters	.....	3,180	3,753
Governors	.....	850	695
Yard connections	.....	5,680	4,471
Small piping	.....		150
Drains	.....		40
Total apparatus	.....	\$11,870	\$10,629
<i>East Ferry Street Station:</i>		<i>Company</i>	<i>City</i>
<i>Apparatus</i>			
Boiler	.....	\$1,090	\$1,060
Exhausters	.....	1,500	1,200
Governors	.....	1,710	1,250
Yard connections	.....	1,780	1,447
Small piping	.....		100
Drains	.....	
Total apparatus	.....	\$6,070	\$5,047
<i>Elk Street Station:</i>		<i>Company</i>	<i>City</i>
<i>Apparatus</i>			
Boiler	.....	\$1,440	\$1,440
Exhauster	.....	1,350	1,417
Governor	.....	970	930
Pumps	.....	280	120
Yard connections	.....	4,650	2,089
Small piping	.....		250
Drains	.....	
Railroad switch	.....	
Total apparatus	.....	\$8,690	\$6,216
<i>Genesee Street Plant:</i>		<i>Company</i>	<i>City</i>
<i>Holders</i>			
No. 1 394,000 cu. ft.	.....	\$40,000	\$36,500
No. 2 302,000 cu. ft.	39,000	34,000
No. 3 641,000 cu. ft.	55,000	55,000
Total holders	\$133,000	\$125,500

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		<i>Forest Avenue Station:</i>	
<i>Holders</i>		<i>Company</i>	<i>City</i>
1,000,000 cu. ft. with house.....		\$74,700	\$86,000
		<i>East Ferry Street Station:</i>	
<i>Holders</i>		<i>Company</i>	<i>City</i>
500,000 cu. ft.....		\$50,000	\$42,500
		<i>Elk Street Station</i>	
<i>Holders</i>		<i>Company</i>	<i>City</i>
No. 1 225,000 cu. ft.....		\$27,000	Not in use
No. 2 225,000 cu. ft.....		27,000	Not in use
No. 3 525,000 cu. ft.....		50,000	\$45,750
Total holders.....		\$104,000	\$45,750

The following is a summary statement of the foregoing, showing the claims of the parties respectively as to amounts at each plant and the total amount allowed by the Commission for apparatus and holders:

<i>Apparatus:</i>	<i>Company</i>	<i>City</i>	<i>Allowed by Commission</i>
Genesee street.....	\$257,180	\$200,704	.....
Forest avenue.....	11,870	10,629	.....
East Ferry street.....	6,070	5,047	.....
Elk street.....	8,690	6,216	.....
	\$283,790	\$222,596	\$265,000
<i>Holders:</i>			
Genesee street.....	133,000	125,500	.....
Forest avenue.....	74,700	66,000	.....
East Ferry street.....	50,000	42,000	.....
Elk street.....	104,000	45,750	.....
	\$361,700	\$279,750	\$307,700
Totals of both.....	\$645,490	\$502,346	\$572,700

A few comments upon the foregoing are required. The sum allowed by the Commission is cost of reproduction new without depreciation and without any allowance for engineering, superintendence, or interest during construction. The Commission caused a very extensive inquiry to be made into the reproduction cost of the apparatus and holders by its gas engineer, such inquiry extending over a period of nearly two months and involving a close personal examination and inspection of each and every article named. Very great effort also was made to obtain correct unit prices, and the engineer made estimates of each article, going into great detail. The result of the examination of the evidence in the light of the examination made by the Commission's engineer is that the Commission believes that the reproduction cost new of the apparatus should be \$265,000. The

reproduction cost new of the holders which are allowed by the Commission as in the public service is that claimed by the Company.

These findings as to reproduction costs are subject to the same criticism as that upon the reproduction cost of street mains hereinafter discussed, namely that the unit prices are of such a character that no particular sum within a range of 25 per cent can be called more than a guess. The Commission could easily and upon evidence place the cost higher or lower than here found by it, and the fixing of the cost must not be regarded in any other light than that the Commission deems it probable that the sums named by it are as reasonable as any other within a range of variation of at least 25 per cent. We do not believe that any person can justly say such allowance approximates more nearly to the reproduction cost than the percentage named.

The allowance of some items was very sharply contested by the City. In the costs found, the Commission has allowed for drawing machines, rectangular condensers, tower scrubber, and all the boilers used at the Genesee Street plant. Comment upon these matters will be made in another connection. At the Elk Street station it has not allowed for the yard connections not in use.

The aggregate of all the foregoing items is so small, and the dispute as to such cost affects the results in this case to so trifling an amount, that discussion of the reasons of the Commission for the action it takes is not deemed necessary.

At the Elk Street station there are two holders not in use and which have not been in use since 1899 or 1900. These holders are not in the public service and have not been for many years. There is no apparent need for them in the future, and there is no evidence justifying an allowance for them. Accordingly, in the allowance for holders by the Commission they are cut out. The others are taken at the costs assigned them by the Company.

Paving Over Mains and Services:

In its summary of the reproduction cost of its property, the Company includes —

Re-paving over mains.....	\$1,004,975
Re-paving over services.....	301,589
Total of both.....	\$1,306,564

It appears from the evidence, and is entirely undisputed, that a large portion of the mains was laid in streets in which there was no paving at the time the mains were laid. A part of the mains, however, was laid in streets which were paved. The foregoing is true of course of the services.

It is claimed by the Company that the cost to it of cutting and replacing pavement for the purpose of laying mains in streets which were paved, and the same as to services, is as follows:

Mains.....	\$174,900
Services.....	30,100
Total.....	\$205,000

The total for re-paving over mains and services being \$1,306,564, and the total actual cost for cutting and replacing pavements having been only \$205,000, it follows that the Company is seeking to establish the sum of \$1,101,564 as a part of the present reproduction cost of its physical property by reason of the fact that since its mains were laid pavement has been placed over them, and that if the mains were to be laid now it would cost that sum to cut and replace the pavements over the mains, although in fact the Company incurred no such expense.

It will be assumed that the figures of the Company as above presented are substantially correct. In fact, upon this point there is a serious difference between the figures submitted by the Company's witnesses Luqueer and Wing; but this may be disregarded at this time. The material facts are:

1. The mains were laid before the pavement was laid, and hence the Company incurred no expense in laying the mains by reason of pavement;

2. If the mains were to be laid at the present time in those streets, the Company would be obliged to incur an expense in cutting the pavement and replacing the same of \$1,101,564, which expense would be a proper and legitimate charge to fixed capital, and would be a sum upon which the Company would be entitled to earn a return of not less than 6 per cent per annum. The question presented is whether this sum should be treated as a part of the present value of the property for the purposes of this case. If it should be so treated, the practical effect would be that it would necessarily and inevitably increase the price of gas per thousand cubic feet upon the basis of the present production, 11 cents: that is to say, every consumer of gas would have to pay 11 cents per thousand cubic feet more for gas if this contention of the Company is allowed than he would have to pay if it were disallowed.

It should be stated at the outset that this item of re-paving to the amount named would be a fair and legitimate item in reproducing the plant as it now exists at the present time. If reproduction cost with or without depreciation is the sole test of the present value of the property, then the item must be allowed. If it is not the sole test, then we are at liberty to consider whether or not this re-paving affords a just and fair basis in adding to what would otherwise be the price of gas the sum of 11 cents per thousand cubic feet.

We are of the opinion that the charge can not be allowed in this case. It would be unjust and inequitable in the extreme.

A fair statement of the situation is this: If the Company has a main laid at the present time in the city of Buffalo, on a street which is unpaved, and its present price of one dollar per thousand cubic feet is a fair and reasonable price to the consumers living upon that street, if the street should be paved tomorrow at the expense of the City at large or of the inhabitants living upon the street, and this without one cent of expense to the Company, the Company would be justly and fairly entitled, upon its theory, to increase the

price of gas to the sum of \$1.11 per thousand cubic feet: and this solely because the people upon the street have chosen to improve their street, and not because of any expenditure of money by the Company or any expense to which it had been put. The pavement is not the property of the Company. It does not have any power over it except in case it should take up the pipes and leave the street it would be compelled to restore the pavement. Any theory of cost of reproduction or of enhanced value which leads to the conclusion that the consumer must pay this extra 11 cents per thousand because of the paving being placed over the mains, is in our judgment radically inequitable and unreasonable; and it is believed that no argument or statement of reasons can add to the force of the statement which has already been made, that the laying of the mains would increase the price to the consumer as stated.

We are, however, called upon to consider how the question has been treated by courts and commissions. So far as we are aware, there has never been any decision of any court which is binding upon this Commission, which holds that cost of reproduction new, with or without depreciation, is a controlling factor in the fixing of value for rate making purposes.

The case of *Smyth vs. Ames* (165 U. S. 466) treats it as a factor which may be considered but not as a controlling factor. The court says:

And in order to ascertain that value [of the property used in the public service] the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, *the present as compared with the original cost of construction*, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses are all matters for consideration *and are to be given such weight as may be just and right in each case.*

The question was presented in the Consolidated Gas case, and the Master found the values in every case to be what it would cost presently to reproduce each item of property in

its then present condition and capable of giving service neither better nor worse than it then afforded.

It was undisputed in that case that as to a considerable portion of the mains the city had at its own expense built costly pavements over them, and also that since the laying of the mains the subsurface had become so crowded with other subsurface structures as to increase the present cost over the actual cost. The United States Circuit Court (157 Fed. R. 849) found that this method of valuation applied to the mains was lawful and consistent with the report upon this point. When the case came before the United States Supreme Court (212 U. S. 19) this precise question was not discussed in the opinion of the court, but it was said:

If the property which legally enters into the consideration of the question of rates has increased in value since it was acquired, the company is entitled to the benefit of such increase.

This, of course, settles nothing, since if the re-paving is to be taken into consideration it has increased in value. If it is not to be taken into consideration, it has not increased in value by reason of the re-paving, and the dictum as to increase in value is, in view of the discussion which is elsewhere given, entirely meaningless.

In the case of Cedar Rapids Gas Light Company (144 Iowa 426), an allowance for increased value to mains by reason of pavements laid over them was disallowed, and this case was affirmed by the Supreme Court of the United States in March, 1912 (223 U. S. 655). The question, however, of pavement over mains was not discussed.

The Wisconsin Railroad Commission in City of Ripon case (5 W. R. C. R.1) disallowed such a claim. It said:

It does not necessarily follow that the utility is to capitalize expenses for municipal betterment in which it has not participated and where such accruing benefits to the utility are remote and incidental, and thus compel the subscribers for utility service to pay increased rates because of public improvements. The improvement is not a proper element of value where the pavement has not been paid for by the utility, nor any expense in connection with it directly

incurred, in determining a value which shall serve as the basis for an adjustment in rates.

In the Des Moines Water Rate case (192 Fed. 193), 38 miles of pipe had been laid in streets prior to the paving thereof. The Master seems to have accepted the view that the item for paving over mains should be allowed. The court discusses but does not decide the question.

The Public Service Commission, First District of this State, in the case of *Mayhew vs. Kings County Lighting Company*, discusses the question at considerable length and states the arguments for and against the charge, and disallows the same.

We consider that the clear weight of reason and equity is against the allowance of any sum whatever by reason of such re-paving as a basis of increasing the rate which is to be paid for gas.

Actual Paving over Mains:

It appears in the evidence offered by the Company that in laying mains to the extent of 91.22 miles, pavement was actually cut. In all of the calculations hereinbefore given regarding street mains, the assumption is that they were laid where there was no pavement. Upon the hearing, the City took the position that in no event was the Company to be allowed the expense of cutting pavements as a part of its capitalization. That position, however, is abandoned upon the brief, and it is claimed by the Company and admitted by the City that the expense of cutting pavements for laying these 91.22 miles of mains was \$174,900. There being no dispute upon this proposition, the item must be allowed.

Complete Services:

The following is a tabulation of the claims of the Company and the City respectively regarding complete services:

		<i>Company</i>	<i>City</i>	<i>Dep.</i>	<i>City's value</i>	<i>Difference</i>
Services in use.....	16,122	\$213,617	\$198,623	\$99,311	\$99,312	\$114,305
Services not in use...	17,070	226,177	.....	.....	.....	226,177
Totals.....	33,192	\$439,794	\$198,623	.....	.....	\$340,482

	<i>Company</i>	<i>City</i>	<i>Dep.</i>	<i>City's value</i>	<i>Difference</i>
Engineering, etc., 11 per cent.	\$48,377	.....	.....	.....	\$48,377
Totals.....	\$488,171	\$198,623	.....	.....	\$388,850
Re-paving.....	223,745	.....	.....	.....	223,745
	\$711,916	\$198,623	\$99,311	\$99,312	\$612,604

It will be noted that the Company's position is that it should be allowed on account of complete services \$711,916, and the position of the City is that it should be allowed \$99,312: a difference of \$612,604. An analysis of the table shows that this difference is made up as follows:

Services not in use.....	\$226,177
Re-paving over services.....	223,745
Engineering, interest during construction, and superintendence.....	48,377
Depreciation of services in use.....	99,311
Difference in structural cost of services in use.....	14,994
Total.....	\$612,604

This analysis however is not in some respects helpful in disposing of the questions at issue concerning these services. The Company divides the services roughly into services in use and services not in use. The City admits that the Company should be allowed for all services in use, but claims that the services not in use should not be allowed. This question however is, in the view which I take of the case, not particularly important.

The real question is, how many services the Company paid for and therefore owns. It early appeared in the case that a large number of the services were paid for by the consumer and that some of the services were paid for by the Company. It is a plain proposition, that where a service is laid in the land of the consumer and extended through the street to the main in front of his house and paid for by him, it becomes his property and not the property of the Company. If the Company is to be allowed in its capital account for such a main, then the consumer must continue in perpetuity to pay a return of at least 6 per cent to the Company upon property which he, the consumer, has paid for. It is clear that this is neither reason nor justice, and can not be permitted.

This question was brought sharply to the attention of the Company early in the hearings, and at that time its counsel made the claim that the Company was entitled to an allowance for services paid for by the consumer. Upon his brief he does not discuss the question, but apparently assumes that it is of no consequence. Pursuant to the direction of the Commission, however, exhibits were submitted by the Company which state as follows:

Prior to the consolidation October 1, 1899, with the exception of the Citizens Gas Company which installed many free services, the constituent companies charged consumers for all services. Under this rule there were laid prior to the consolidation approximately 21,342 complete services. October 1, 1899, a rule was established by which free services were put in by the Company, and under this rule 11,888 services were laid, of which 8032 were laid free and 3856 were charged for in whole or in part. October 8, 1910, a rule was promulgated by the Company, which was approved by this Commission, under which all services were to be paid for by prospective consumers. Under this rule 205 services have been paid for by the consumer up to December 31, 1910. The following is a summary of the situation as disclosed by the Company's own evidence:

	<i>Paid for by consumers</i>	<i>Laid free</i>	<i>Consumer paid excess length</i>	<i>Totals</i>
Laid before October 1, 1899.....	21,342	.....	.....	21,342
Laid between October 1, 1899, and October 8, 1910.....	1,629	7,827	2,227	11,683
Laid since October 8, 1910.....	205	.....	.....	205
	<hr/> 23,176	<hr/> 7,827	<hr/> 2,227	<hr/> 33,230
Services discontinued.....	.....	.....	.....	38
Total in use and not in use December 31, 1910.....	.....	.....	.....	<hr/>33,192

It appears from this table that the total number of services claimed by the Company to have been laid is 33,230. Of these it appears by its own tabulation that 23,176 were paid for by consumers, leaving 10,054 which have been paid for by the Company. Of the total number, 38 have been discontinued. It does not appear whether these 38 were paid for by the consumers or paid for by the Company; but

if we assume that they were paid for by the consumers, that is the most favorable view for the Company. It also appears that on 2227 of the services the consumer paid for excess length, or for some other reason paid something more than the regular amount. This is immaterial, since the Company should be allowed for all that it paid for. If we assume that all of the services which are not in use are those which were paid for by the consumer, this is the most favorable assumption which can be made for the Company; and this is probably a fair and reasonable assumption, since all the services with the exceptions noted laid prior to October 1, 1899, were paid for by the consumer. Those services were laid in the older parts of the city and in the business portion where the use of gas has been superseded by electricity and natural gas. While there is no direct evidence that these are the services which are not now in use, still it is a justifiable assumption and one which should probably be made. It does appear, however, undisputedly, that since the 1st day of October, 1899, the Company has laid 10,054 services, of an average length of 55 feet, which it has paid for; and that is the number which it should be allowed in this case.

As to the cost of putting in these services, there is some discrepancy in the evidence. Mr. Luqueer fixed the price at \$13.25 a service, upon the basis of an average length of 55 feet. He states that in arriving at this figure he knew the price per foot of the service pipe, and added the cost of fitting and the labor, and arrived at a certain total cents per foot, to which he added 10 per cent for contingencies, permits, tools, and inspection. This is probably as near a correct estimate of the cost of laying these service pipes as can be obtained, and therefore should be adopted. The cost of 10,054 complete services at \$13.25 each is \$133,215.50, and this should be taken as the fair reproduction cost of these pipes, without considering engineering and interest during construction. The question of what percentage, if any, should be allowed for these will be considered elsewhere, as

will also the subject of depreciation and re-paving. The amount that should be added for paving actually cut will also be considered in another connection.

Main-to-curb Services:

The Company claims that it should be allowed the sum of \$119,385 on account of the laying of main-to-curb services. The items of this amount are as follows:

	Number	Cost
Main-to-curb services.....	7485	\$37,425
Engineering, superintendence, and interest.....		4,116
Re-paving.....		77,844
Total.....		\$119,385

These are services laid in the street, from the main to the curb, opposite vacant lots and having no connection with any consumer. They are required by the City to be laid in streets where it is proposed to pave in order to avoid cutting the pavement in case a complete service should be thereafter required. Payment is made to the Company by the City for laying these services, and under the rule heretofore prevailing, in case a complete service connection is made, there has been a refund from the Company to the consumer of the amount thus paid. This refund, of course, was made upon the theory that the Company was to install the service free. The rule now being that the consumers must pay for the services, this practice of course will have to be changed.

It is claimed that the number of these stub services on October 1, 1897, was 8080, and that there has been installed since that time 1330, making a total of 9410. The number of these stubs extended so as to make complete services since October 1, 1897, is 1925, so that the number of stub services in existence on the 31st day of December, 1910, was 7485.

It appears that the Company has on deposit, received as its charge for laying stub services, the sum of \$40,294, while the average cost of laying is said to be \$5. If this is the real average cost, the cost of laying the 7485 was \$37,425, so that the Company has an excess in its treasury of \$2869 above the actual cost of laying. It is stated, however, by the Company, that of the 1925 stub services which have been extended

into complete services since October 1, 1897, in 1316 cases no claim has been established by the owner or City for a refund of the amount paid. At an average of \$5 for each one of these services, the Company is theoretically indebted on account of them in the amount of \$6580. Taking this amount from the total fund in hand, \$40,294, we would still have \$33,714 in the treasury of the Company as against the cost of the 7485 stub services which it claims to have been in existence December 31, 1910.

At the present time the City pays for laying these stubs the sum of \$4.50 each. For 7485 services at this rate, the price would be \$32,982.50; less than the amount on hand.

The Company not having shown distinctly the cost of these stub services, it is impossible to allow it any return upon them in view of all the foregoing facts. It may be that there is a small sum of somewhere from one thousand to five thousand dollars upon which it should be allowed a return, but this does not appear with distinctness. The burden being upon the Company to show what the facts are, it must be held that it has failed to establish with sufficient clearness a claim to any sum to permit it to be allowed.

Curb-cocks and Boxes:

Upon this item the positions of the Company and the City are shown by the following tabulation:

	<i>Company</i>	<i>City</i>
14,786 service cocks.....	\$9,445	\$6,223
14,726 street boxes.....	8,835	7,363
60 roadway boxes.....	112	112
Labor setting.....	4,436	4,436
Totals.....	\$22,828	\$18,143
Engineering, superintendence, and interest 5.11 per cent.....	2,511	.....
	\$25,339	\$18,143

The Company claims \$25,339 therefor; and the City is willing to allow, as we understand the evidence, \$18,143. The differences as to the cost of installation arise from different unit prices for the cocks and boxes. The evidence on behalf of the Company was given by the witness Haas, and on the part of the City by the witness Hammill. The evidence is somewhat conflicting as to the prices of these articles

in the Buffalo market, but it appears distinctly from the evidence of the witness Haas that he has taken unit prices such as prevailed at the time of giving the evidence and applied them as best he could to different sizes of the articles named. The witness Hammill simply gave prices that he was selling certain articles at, without knowing how those articles corresponded with those owned by the Company. There is no possibility of determining with accuracy what the right of this matter is. Since Mr. Haas is as well acquainted with the facts as anyone can be, from his long experience in superintending these matters, and is also acquainted with the prices actually paid by the Company, probably the best disposition of this matter which can be made is to accept his figures. Therefore the construction cost should be taken as being \$22,828.

The matters of engineering, supervision, and interest will be considered in another connection.

Meters:

Exclusive of the Peoples Gas Light and Coke Company meters, of which there are 277, the Company shows that it has 20,421 meters. It claims the reproduction cost of these meters ready for setting, including therein the cost of the meter, freight, cartage, and accessories, to be the sum of \$145,859; setting \$10,061; engineering, superintendence, and interest during construction \$17,151: total \$173,071.

The City's position is that the reproduction cost of the meters is \$135,383; cartage \$600: total \$135,983. It estimates a depreciation of 25 per cent upon this sum, with the result that it claims the present value of the meters to be \$101,988, exclusive of the meters owned by the Peoples Gas Light and Coke Company. It makes no allowance for setting of the meters, nor for engineering, supervision, and interest: its claim in this respect being that the setting has been charged by the Company to operating expenses and hence has been paid by the consumer. It also claims that there is practically no interest during construction, and that

there has been no charge actually made by the Company for engineering and superintendence other than what has gone into operating expenses.

Here is an instance of the inconsistency in the position of the City. On many questions it vehemently urges that the reproduction cost must be taken as the present value of the property. If this be done in the case of meters, the setting is clearly an element of such reproduction cost; and also it would be necessary to make some allowance for engineering and superintendence in directing the work of selecting the meters and superintending the placing thereof.

If, on the other hand, the reproduction cost is not conclusive upon the question of value, there is great force in the contention of the City that what has already been paid for as an operating expense by the consumers should not now be capitalized and made a basis of further charges against the consumers. This position was fully recognized by witness Luqueer, who did not, in making up his estimate of the value of the meters, include anything for setting: saying at page 316 of the evidence that it was the practice of the Company to charge to operating expenses the cost of setting, and it did not seem fair to duplicate it in the value of the meter in place.

There is but little difference between Mr. Luqueer and Mr. Brill, the witnesses for the respective parties, as to the cost of reproducing the meters. They both adopted the same unit prices paid to the manufacturer, but differ somewhat as to freight, cartage, and accessories. Mr. Luqueer's evidence is the more satisfactory in this respect for the reason that he testifies that he has made up his amounts from actual cost to the Company. Mr. Brill does not claim to have set any meters, and merely is making an estimate of what he thinks it ought to cost. Mr. Luqueer's estimate should be taken, and therefore it must be found that the reproduction cost of the meters in question is \$145,859. The cost of setting is \$10,061. The question of engineering and superintendence will be treated in another connection.

It is true that the witness Forrest testified to a much less unit price for meters delivered, but he was familiar with another make; and the evidence is positive on the part of Mr. Luqueer that the price he gives is what the Company is actually paying.

Tools and Implements, Office Furniture and Fixtures, Stable Equipment:

The evidence regarding the quantity and reproduction cost of the tools and implements of the Company is exceedingly defective. We are unable to find an inventory of the same, with prices, in the evidence; and in fact, no witness gives any evidence concerning the same. In Mr. Forstall's appraisal appears the item "tools and implements \$10,042"; and from his evidence it would seem that he took this amount from some appraisal made by someone connected with the Company. The City, however, upon its brief, admits this amount; and there seems to be no sufficient reason for questioning it at this time.

Office furniture and fixtures are valued by the Company to be \$7300; and by the City, \$4380. The stable equipment is valued by the Company at \$13,449, and by the City at \$10,448.

The difference between these amounts is not sufficient to justify this Commission in attempting to ascertain what the true amount is; and in fact, with property of this character, the basis of valuation depends upon the notion of the appraiser very largely as to whether the property is to be given the value that it has in use or the value that it has to sell second-hand. Generally speaking, the value placed upon this property by the Company is the former; and by the City, the latter. The former appears to us to be more just and equitable, and therefore the sum claimed by the Company should be allowed.

The following is a summary of these items:

Tools and implements.....	\$10,042
Office furniture and fixtures.....	7,300
Stable equipment.....	13,449
Total.....	\$30,791

STREET MAINS

The total length of the street mains owned by the Gas company is 2,170,856 feet, which is an amount slightly in excess of 411 miles. The amount of mains of the Peoples Gas Light and Coke Company is 38,891 feet, a little over 7 miles. The total mileage of both companies is 418 miles. Of this, it is stated by the Company that 63 miles have been laid since 1897, leaving 355 miles which were laid previous to 1898. There is no evidence in the case showing or tending to show the cost of mains laid before October 1, 1897. There is some evidence showing the cost of mains laid since that time. Neither party, however, seems to give any particular attention to these cost figures on the 63 miles, but both have given a large amount of evidence as to the reproductive cost new of the mains and the depreciation thereof.

The position of each party as to the mains owned by the Buffalo Gas Company is disclosed by the following table, in which are shown the various sizes of pipe in use, the number of feet of each size, the estimated value per foot, and the total. The figures in this table represent the cost of reproduction new, making no allowance for engineering, inspection, interest during construction, pavements, rock excavation, or depreciation, all of which will be considered separately.

Size	Company			City	
	Feet of main	Per foot	Total	Per foot	Total
2 in.	21,112	\$0.27	\$5,700	\$0.263	\$5,552
3 in.	453,818	.40	181,527	.404	183,342
4 in.	1,014,726	.56	568,247	.502	509,392
5 in.	414,421	.70	290,095	.688	285,122
8 in.	46,722	1.00	46,732	.927	43,311
10 in.	76,482	1.25	95,602	1.174	89,790
12 in.	70,950	1.50	106,425	1.514	107,418
16 in.	11,849	2.20	26,068	2.164	25,641
20 in.	60,622	2.95	178,835	2.905	176,106
24 in.	134	3.90	601	3.638	560
	2,170,856		\$1,499,822		\$1,426,234

As to lengths of the various sizes of pipe there is no dispute. In determining reproduction cost, therefore, the Commission has only to ascertain the proper unit price per foot. Unit price per foot should properly be divided into unit price of straight pipe, and unit price per foot of all other

expense connected with the laying, including cartage from railroad, distributing pipe, trenching, laying, and backfilling. Neither party includes in the figures shown in the foregoing table anything for interest during construction, engineering, or supervision. These also will be discussed separately.

UNIT PRICES GENERALLY

It is apparent that, due to the great lengths of pipe, the question of unit prices is one of very great importance, and that widely divergent results in the totals can be obtained by slight and apparently inconsequential divergencies in unit prices per foot. This may be fairly illustrated by a comparison of the results obtained in an investigation had by the former Commission of Gas and Electricity upon the same subject in 1907 with the results shown in the present hearing. In 1907 the Company claimed what may be termed the structural cost of the mains then owned by it to be \$1,499,935. It now claims the same structural cost to be \$1,499,822, a sum slightly less than that for which it contended in 1907. An examination of the exhibits submitted by it in the two years discloses that since the hearing in 1907 the Company has laid 160,331 lineal feet of mains, equaling 30.4 miles. The cost of these mains at the unit prices submitted in this hearing by the witness Luqueer on behalf of the Company would be \$114,548. Mr. Luqueer says that the Company was paying no higher price for labor in 1911 than in 1907. He does, however, claim that the efficiency of the labor is not as great in the latter year as it was in the former. The unit prices in the two years, however, were different. A single comparison as to 4-inch pipe will illustrate the point:

	Unit price per foot for pipe	Unit price for labor and accessories	Total per foot
1907.....	27.5 cents	21 cents	48.5 cents
1911.....	25.0 cents	31 cents	56.0 cents

It will be observed from the foregoing that the price of pipe is 2½ cents higher per lineal foot, while the unit price for everything else entering into the structural cost, which

will be termed labor and accessories, is 10 cents per foot higher in 1911 than in 1907. Upon the 4-inch pipe alone this would make a difference in the cost of \$101,472.

In 1907 the Company submitted a table showing how it made up the unit price per foot for labor and accessories, and reached the aggregate sum of 21 cents. In 1911 such details were not submitted, and it is therefore impossible to ascertain from the evidence for what reason the Company increased this unit price practically 50 per cent.

UNIT PRICE PER TON FOR PIPE

The determination of what unit price per foot for straight pipe should be adopted is a matter of great difficulty. If we adopt the theory that reproduction cost new is the proper test of value, the courts have held that the value must be found as of the time of the valuation, which in this case was the year 1911. If any other period of time be taken, it is clearly a departure from the rule. There have been, however, large fluctuations in the market price of pipe. The price varies greatly from year to year, and therefore engineers have usually considered that it is unfair and inequitable to adopt the price of one year, and generally take an average of years, thus abandoning the reproduction cost new at the time of valuation. So far as we know, this average has been generally confined to five years. The use of an average, however, is theoretically open to serious objection. It does not give the price at the time of the valuation; it does not, unless by accident, give the price at any particular period. An average does not necessarily represent the cost at any one time, and therefore the use of an average is merely an effort to approximate what is supposed to be justice instead of adhering to any logical and consistent rule.

If we adopt the cost to the Company as a unit price, that is consistent and intelligible. If we adopt the price at the time of the valuation, that is also consistent and intelligible. Either may or may not work out justice. The moment we

take an average over a series of years, we admit that neither the cost nor the price at the time of the valuation does justice to both parties; and therefore by the use of an average we have a direct recognition of the principle that in fixing values for the purpose of rate making, justice and equity between the parties should be considered rather than any hard and fast rule.

When we adopt an average, however, we immediately get into difficulties. Should the average cover the period during which the pipe was laid, and this upon the theory of endeavoring to approximate the actual cost to the Company, upon the assumption that the actual cost can not be otherwise ascertained? If we take a period near the time of valuation, if the reproduction cost is the value, why should we take the value five years before the valuation as an element to be considered? What end of justice is to be subserved by that? It will be interesting to look into the actual figures and see how they work out. The City, in this case, has given evidence of the actual cost or market price of water pipe for a period of 19 years ending with the year 1911. The Commission has obtained the price of such pipe for the year 1912, so as to make a round period of 20 years. It is proven in the case, and undisputed, that the price of gas pipe is \$1 per ton more than of water pipe, and therefore by adding \$1 to the price testified by the witness as the price of water pipe, we get the market price of gas pipe during the period in question. These prices per ton are as follows:

1894, \$20.60; 1895, \$18.60; 1896, \$20.50; 1897, \$18.25; 1898, \$17.50; 1899, \$30; 1900, \$23.95; 1901, \$23.50; 1902, \$29.50; 1903, \$31; 1904, \$25; 1905, 3-inch pipe \$31, 4-inch pipe \$27.40, 6-inch pipe \$26.40, 24-inch pipe, \$25.90; 1906, 3-inch pipe \$36, 4-inch pipe \$34, 6-inch pipe and upward \$30.50; 1907, 3-inch pipe \$41, 4-inch pipe \$39, 6-inch pipe and upward \$31.50; 1908, \$24.50; 1909, \$23.30; 1910, 3-inch pipe \$27.90, 4-inch pipe \$25.90, 6-inch pipe \$24.40; 1911, \$23.40; 1912, \$22 to \$24.

Dividing the twenty-year period for which the foregoing figures are given into four periods of five years each, the average price for the first five years, from 1893 to 1897, both inclusive, was \$20.59. For the second five-year period, 1898 to 1902, both inclusive, the average was \$24.89. For the third five-year period, 1903 to 1907, both inclusive, the average was \$31.48; and for the fourth period, 1908 to 1912, both inclusive, the average was \$24.02. The prices for 1912 have been taken from quotations contained in *The Iron Age*.

The practical result of adopting the price prevailing in one year should be noted. If a rate investigation had been held in 1895, the price per ton would have been \$18.60; in 1907 it would have been \$40; in 1908, the next year, it would have been \$24.50. Such results as these are clearly preposterous and can not be tolerated. The business of a company and its returns can not be made dependent upon such fluctuations as these in the market prices of iron pipe, which depend upon a large number of variable factors.

So if the average were to be adopted for the five years 1908 to 1912, it would be \$24.02. The hearings in this case, however, were had in the year 1911. If the five years immediately preceding that year had been adopted, the result would have been a price of \$29.54 per ton, as against practically \$24 for the five-year period ending with 1912. In other words, there would have been practically 23 per cent greater price allowed for the pipe upon the average of the former period over the average of the latter period. This would make a difference of \$165,000 in the cost of the pipe, and would necessitate upon the calculations elsewhere given a difference in rate per thousand cubic feet in the price of gas of \$0.0165.

The practical effect of these differences in the case it is well to consider. Upon the basis of the figures submitted by the Company, there are almost exactly 30,000 tons of castiron pipe in these mains. At the price prevailing in

1897, when the present parties in interest took over the property, the pipe would have been worth \$547,500. Ten years later, in 1907, it would have been worth \$1,200,000: a difference of \$652,500. This difference would, upon the basis of a return of 6 per cent, make a difference with the Company in its returns of \$39,150 per annum, and 6½ cents per thousand cubic feet in the rate. The following shows the value of the pipe at the average price for each five-year period:

1893 to 1897.....	\$617,700
1898 to 1903.....	746,700
1903 to 1907.....	944,400
1908 to 1912.....	720,600

The price per ton which has been adopted by the Company in this investigation is \$30 for 3-inch pipe, \$25 for 4-inch pipe, and \$24 for all other sizes.

UNIT PRICE PER FOOT FOR LABOR AND ACCESSORIES

Upon the cost of mains the Company produced three witnesses: Luqueer, Forstall, and Wing. The figures upon which it stands in its brief are those submitted by Mr. Luqueer. It, however, in the same brief, terms Mr. Wing "a very competent civil engineer". Mr. Wing has had practical experience for years in the laying of mains. Mr. Luqueer has had none, so far as appears from the evidence.

The discrepancies in their evidence early attracted the attention of the Commission, and an analysis of the same developed some very curious and instructive results. The following table is an analysis of the unit prices used by each as to cost of pipe and cost of labor and accessories. It also shows the total structural cost per foot of pipe laid, and the difference in the unit price per foot used by them respectively for labor and accessories.

The unit prices ascribed to Wing are those given by him in his table plus the unit prices for specials given by the Company in 1907. Wing gives the aggregate of specials as \$74,889. The prices for specials used applied to the quantities produce practically this sum.

Analysis of the unit prices per foot of (a) straight pipe and (b) labor and accessories used by Luqueer and Wing in fixing the reproduction cost of mains:

Size in inches	Wing			Luqueer			Diff. in labor and accessories	% Diff. in labor and accessories
	Pipe	Labor and accessories	Total	Pipe	Labor and accessories	Total		
2.....	8.6	9.4	18	8.6	18.4	27	9	95.7
3.....	16.5	18.25	34.75	16.5	23.5	40	5.25	28.8
4.....	25	18.75	43.75	25	31	56	12.25	65.3
6.....	36.96	23.54	60.50	36.96	33.04	70	9.50	40.3
8.....	51.48	27.02	78.50	51.48	48.52	100	21.50	80
10.....	68.52	34.48	103	68.52	56.48	125	22	63.8
12.....	87	41	128	87.63	63	150	22	53.6
16.....	129.96	55.54	185.50	129.96	90.4	220	34.86	62.7
20.....	180	68	248	180	115	295	47	70
24.....	245.04	78.96	324	245.04	144.96	390	66	83.6

An examination of the last column of the table discloses the difference between them, since the same unit price for pipe is used by both. These differences in the unit price for labor and accessories can not properly be appreciated without applying them practically to the case and ascertaining what the results of these differences work out. The following table shows such practical results:

Analysis of the evidence of the witnesses Luqueer and Wing as to the cost of mains; quantities of pipe are the same with both; results vary because of the different unit prices employed:

	Luqueer	Wing	Difference	Per cent	Difference in rate per M cu. ft.
Pipe.....	\$745,577	\$745,577			
Labor and accessories.....	751,245	495,955	\$255,290	52	\$0.0258
Rock excavation.....	111,537	54,501	57,036	104	.0037
Actual paving cut.....	174,900	201,795	26,895	15	
Totals.....	\$1,786,250	\$1,497,828	\$288,431	19	
Paving laid over mains.....	805,950	670,715	135,235	20	
	\$2,592,209	\$2,168,543	\$423,666	19.5	
Interest, engineering, and inspection.....	177,249	431,540	254,291	143	.0254
Totals.....	\$2,769,458	\$2,600,083			

Attention to the details of these statements is now required.

1. It will be noted that the aggregate of all costs of every kind reached by Luqueer is \$2,769,458. That obtained by Wing is \$2,600,083. So if we confine ourselves to the aggregate result there is not a very startling difference between the two. It is in the details that we find matter of interest.

2. In the matter of labor and accessories in pipe laying, Luqueer's total is \$754,245; Wing's is \$495,955: a difference of \$258,290. Hence Luqueer's estimate is 52 per cent higher than that of Wing.

3. Luqueer's estimate for rock excavation is \$111,537. That of Wing is \$54,501. Luqueer's estimate exceeds that of Wing by \$57,036, a difference of 104 per cent.

4. It is undisputed that a certain amount of mains was laid under the pavement. Luqueer finds the cost of cutting and replacing pavement to be \$174,900; Wing, \$201,795: Wing exceeding Luqueer by \$26,895, a difference of 15 per cent.

5. In the matter of interest during construction, engineering, and inspection, Mr. Luqueer thinks \$177,249 is the right amount, while Mr. Wing's tables disclose for the same matters \$431,540: a difference of \$254,291, equivalent to 143 per cent excess over Luqueer's figures.

The practical effect upon the Company and upon consumers of these variations in the unit prices should be carefully noted.

The rule of law as laid down by the United States Supreme Court is that a return upon the fair value of less than 6 per cent per annum is, if enforced by the Public Service Commission, confiscation, to a greater or less extent, of the property of the company. It seems, therefore, that for every \$100,000 of property value, the Company is entitled to a return from its consumers for the use of capital of \$6000. It so happens that the amount of gas which it is selling annually is in the neighborhood of 600,000 thousand cubic feet. One cent for each thousand cubic feet of gas sold produces a return of \$6000; hence every variation of \$100,000 in the value of the property of the Company upon which it is entitled to a return of 6 per cent produces a variation of almost exactly one cent per thousand cubic feet in price. Applying this to the difference between the total cost of labor and accessories given by Luqueer and

Wing, namely \$258,290, we find that this difference would produce a variation in price to the consumer of 2.58 cents per thousand cubic feet, and upon the rock excavation a variation of fifty-seven hundredths of a cent: upon the two matters the total variation in price would be 3.15 cents. Accordingly, if we adopt Mr. Luqueer's prices for labor and accessories, and rock excavation, the price of gas must be increased over that which would be proper if Wing's unit prices were adopted, the sum of 3.15 cents per thousand cubic feet. Upon its total output for 1911, this would result in a difference to the Company per annum of \$20,000. The Company sold to the City in the year 1911 about 131,000 thousand cubic feet, and the difference to the City arising from this difference in price per thousand cubic feet would have been \$4126. If we capitalize the excess cost to the City at 5 per cent, the result is that the City would be obliged to pay a 5 per cent return upon \$82,500.

These aggregates are so startling that we are necessarily required to examine into the evidence of each witness to ascertain how he justifies himself. Mr. Luqueer testifies that he is in the employ of Humphreys and Glasgow, consulting engineers, and has been since 1899; that he is secretary and director of the company; and in addition to that, when he started with them he was consulting engineer, and since then assistant engineer. It does not appear that he has ever been practically engaged in field work. He prepared most of the tabular statements introduced in evidence by the Company, and upon the question of cost of labor and accessories in pipe laying he says at page 221 of the evidence: "I then obtain the cost of laying and other materials, then carting, and add to that the cost of pipe per foot, and arrive at a total cost, to which I add 10 per cent to cover contingencies, tools, permits, city inspection and contingencies; and arrive at a final price per foot for each size of pipe." Further on he says that the statement given is "based on actual figures with the exception of the contin-

gency item to which I have just referred. The various materials that go into the laying of pipe, such as lead, etc., are based upon what they could supply them to us for."

The foregoing is all that I am able to find disclosing how Mr. Luqueer makes up this unit price. Mr. Wing testifies that he is a civil engineer practicing in the city of Buffalo and the surrounding country; has been an engineer 21 years, and is a graduate from Cornell University; that he has a general practice both as a surveyor and as a contractor, and supervision of contracts, and that he is familiar with the cost of laying pipe. He was asked, at page 1103: "In considering the question of putting the mains in the ground, what physical situation did you assume?" To this he answered: "I assumed a situation similar to what I would have in work I have done where we have streets in villages that are unimpaired by excessive traffic and where the village which makes the contract provides every convenience and facility for you to operate in the laying of your system." Question: "And you figure in the actual cost on that basis? Upon the basis of what it is actually costing you now in present systems?" Answer: "Yes."

He further says that the figures he uses are on the basis of what it is costing him to do similar work at the present time, or as of the 1st of January, 1911. He says that he did not take into consideration the physical obstacles under the pavement which exist in the city of Buffalo, referring by this to water pipes, sewer pipes, and the like.

It will be seen by the foregoing somewhat detailed statement of the evidence of these two men that neither of them gives us any assistance in determining whether the conclusion which he has reached as to the proper unit price is correct or incorrect, beyond his bare assertion that it is what he finds costs to be.

The Company, in the investigation of 1907, discloses how it made up its unit price of 21 cents per foot for labor and

accessories in the laying of 4-inch pipe, and the following are the details:

Special castings.....	2 5 cents
Lead and cement.....	2
Grading.....	1
Tools.....	1 5
Miscellaneous.....	2
Excavating and backfilling.....	12
Total.....	21 cents

How it obtains the additional 10 cents per foot in the present investigation we have no information. Such astonishing divergencies as those noted on the part of its own witnesses naturally incited the Commission to pursue its investigation into the aggregate unit prices for labor and accessories in other fields, and the following are some of the results of such investigation.

First, an examination was made of its files or estimates submitted by gas corporations asking for capitalization of expenditures for laying mains. A company of large experience, careful methods, and correct accounting habits, filed in the year 1911 an estimate for construction in the years 1912 and 1913, of 17,500 feet of 4-inch pipe, at an estimated cost complete of 40 cents per foot; the Company's estimate in this case of 4-inch pipe complete is 56 cents per foot, a difference of 40 per cent. A further estimate was contained in the paper examined for 8900 feet of 6-inch pipe at 56 cents per foot; the estimate of the Company in this case for the same size pipe being 70 cents per foot, a difference of 25 per cent. Generally speaking, the conditions for laying are apparently the same in the two cities. These marked differences in estimates induced the Commission to examine the actual costs of laying of two large gas companies situate in different cities in the Second District. A careful analysis was made of their books, and the following is the actual cost of 4-inch pipe complete laid in the city which will be termed "A" during the years given:

	<i>Number of feet laid</i>	<i>Labor per foot</i>	<i>Materials per foot</i>	<i>Total per foot</i>
1909.....	38,615	\$0.188	\$0.251	\$0.439
1910.....	34,999	.137	.338	.475
1911.....	22,724	.234	.294	.528

The following shows the lengths of pipe laid in city "B" during the years named, with the labor cost per foot for 4-inch pipe:

	<i>Number of feet laid</i>	<i>Labor per foot</i>
1908.....	15,809	\$0.174
1910.....	59,688	.165
1911.....	25,627	.166

The labor cost for different jobs in city "B" for 4-inch pipe, the material excavated being clay, was as follows: 17.01 cents, 7.09 cents, 15.19 cents, 10.80 cents, 38.59 cents.

The following table is a statement of the cost complete of 6-inch pipe in city "A" for the years named:

	<i>Number of feet laid</i>	<i>Labor per foot</i>	<i>Materials per foot</i>	<i>Total per foot</i>
1909.....	63,265	\$0.203	\$0.351	\$0.559
1910.....	103,635	.18	.412	.592
1911.....	74,432	.175	.393	.568

The following is the labor cost per foot for 6-inch pipe in city "B":

	<i>Number of feet laid</i>	<i>Labor per foot</i>
1908.....	316	\$0.29
1910.....	11,893	.234
1911.....	4,535	.197

The labor cost per foot for laying 6-inch pipe in clay in city "B" on different jobs is as follows: 36.92 cents, 17.43 cents, 17.40 cents, 35.80 cents.

Attention is called to some of the curious and anomalous results disclosed by the foregoing tables. The labor price per foot in city "A" for the laying of 4-inch pipe was 18.8 cents in 1909, 13.7 cents in 1910, and 23.4 cents in 1911. The cost per foot for labor in the laying of 6-inch pipe in 1909 was 20.8 cents, being 2 cents more than the cost per foot for 4-inch pipe. The labor cost for 6-inch pipe in 1910 was 18 cents, being 4.3 cents more than the cost of 4-inch pipe. The labor cost for 6-inch pipe in 1911 was 17.5 cents, as against 23.4 cents cost of laying 4-inch pipe, thus making the cost of labor for laying 6-inch pipe 5.9 cents less than the cost of laying 4-inch pipe. The quantities in both cases were very considerable, being 22,724 feet of 4-inch pipe, over 4 miles; and 74,432 feet of 6-inch pipe, over 14 miles.

So the labor cost for laying 4-inch pipe in 1911, in city "A," was 23.4 cents, as against 16.6 cents in city "B". In 1910, in city "A," it cost 13.7 cents, as against 16.5 cents in city "B". In 1910, in city "A," the labor cost of laying 4-inch pipe, 103,635 feet, was 18 cents, as against a labor cost of 23.4 cents for laying 11,893 feet in city "B".

Further analyses of other cities and costs would neither add to nor detract from the force of the foregoing. Estimates of engineers are necessarily derived from actual experience in practical work. Just what estimate an engineer would make from the foregoing it is impossible to say: doubtless it would depend largely upon the mental characteristics of the engineer.

Since in guessing at reproduction cost the tribunal charged with that pleasure is compelled to depend upon estimates of engineers, the Commission, after studying upon actual costs, concluded to investigate further into the estimates of engineers as to the particular point now under consideration, namely the cost of labor and accessories in laying gas mains, including therein the total cost of everything, pipe laid complete, except the cost of straight pipe. It accordingly has assembled for this class of work the estimates of seven engineers: three of them witnesses in this case; three from whom estimates have been obtained by the Commission outside of the evidence, such estimates being obtained independently one from the other so that neither knew the estimate of any other; and one the estimate of an engineer employed by the Gas company and its predecessors for many years, which estimate is found in an affidavit filed by the Company in March, 1900, before the State Board of Tax Commissioners. This affidavit was put in evidence in this case and is before the Commission for what it is worth. In it are contained sufficient data to enable the Commission to figure out with accuracy the unit price for labor and accessories which must have been adopted by the affiant.

It should be remarked that this unit price per foot for labor and accessories as given by the different engineers may not relate to exactly the same conditions of digging. It is probably true that there are some variations in the minds of the different engineers, but the utmost pains has been taken to bring them to exactly the same basis so far as possible; and the variations, if any, in the minds of the engineers as to this point are no greater and not as great as will appear between different engineers sworn as witnesses.

The following table shows the size of pipe in inches and the estimate per foot for labor and accessories of each engineer, given in cents and fractions of a cent:

Size in inches	1	2	3	4	5	6	7	Diff. highest and lowest
2.....		9.4	15.6	18.2	.....	16	.....	8.8
3.....	21.2	18.25	27	24.1	.....	21	32.8	14.55
4.....	20	18.75	25.9	31.6	22.3	30	33.8	15.05
6.....	21.5	23.54	31.66	35.48	36.9	38	45.8	24.3
8.....	23.4	27.02	35.47	47	48.6	47	54.33	31.29
10.....	23.6	34.48	43.58	54	63.3	55	60	39.7
12.....	29.4	41	56.6	63	116.3	66	66.8	86.9
16.....	44.5	55.54	78.24	89	163.2	74	85	118.7
20.....	52.5	68	108.1	112	204.3	109	116	151.8
24.....	.....	78.96	120.16	144	.....	142	.....	65.04

It will be observed that the unit prices per foot range from 18.25 cents to 32.8 cents for 3-inch pipe; from 18.75 cents to 33.8 cents for 4-inch pipe; from 21.5 cents to 45.8 cents for 6-inch pipe; from 23.4 cents to 54.33 cents for 8-inch pipe; from 23.6 cents to 63.3 cents for 10-inch pipe; from 29.4 cents to 116.3 cents for 12-inch pipe; from 44.5 cents to 163.2 cents for 16-inch pipe; from 52.5 cents to \$2.04 for 20-inch pipe; and from 78.96 cents to \$1.44 for 24-inch pipe.

The remarkable differences disclosed by this table call for no comment. They did, however, excite some interest as to how such differences could occur, and accordingly further analysis was made of the details of prices for each character of work making up the total of labor and accessories. The following table is an analysis of such details of two of the engineers with reference to the matter of specials, excavation and backfill, and hauling pipe. The sizes of pipe are given

in each case and the unit prices used by each engineer are placed in columns "A" and "B" respectively.

	4"		6"		8"		10"		12"		16"		20"	
	A	B	A	B	A	B	A	B	A	B	A	B	A	B
Specials.....	7	9	16	14	22	19	29	26	76	38	1.10	48	1.36	68
Excavation and backfill.....	7.5	23.6	9	31.8	10.5	33.4	10.5	33.6	14.5	35.1	17.4	44	22.5	51.6
Hauling pipe....	1	5	1.6	7	2.3	8	3	10	3.8	30	5.8	48	8.4	70

The results of two of the discrepancies shown in the foregoing table are worthy of attention. The difference for excavation and backfill on 4-inch pipe is 16.6 cents per foot. The Company has 1,014,726 feet of 4-inch pipe, and accordingly the difference between the two engineers as to the cost of excavation and backfill is \$163,370. On 6-inch pipe the difference is 22.8 cents per foot. The length of 6-inch pipe is 414,421 feet, and the difference in cost between the two is \$91,488: making a total difference for these two sizes of pipe alone of \$254,858. This would make a difference in the rate of $2\frac{1}{2}$ cents per thousand cubic feet, and hence upon an estimated output of 600,000 thousand cubic feet would make a difference in the revenues of the Company of \$15,000 a year.

Inquiry into actual costs and engineers' estimates not proving as thoroughly satisfactory as a person of conscientious mind would require, it was then believed that possibly reference to the bids of experienced contractors on work would throw some light upon this question of unit prices. This Commission has occasion to pass upon bids of very many contractors for various classes of work in grade crossing elimination cases. Reference to those bids was then made to see whether there was any common opinion among contractors of large experience as to the cost of plain and simple kinds of work and materials. In the tables which follow there should be no comparison between bids upon different works. The comparison, to be fair, should be simply between the highest and lowest bids in a given case, since the conditions in the different cases may differ materially.

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The following table shows the minimum and maximum bids in cents for structural steel used in bridge work and the percentage increase of maximum over the minimum bid:

<i>Min. bid (cents)</i>	<i>Max. bid (cents)</i>	<i>Percentage increase of maximum over mini- mum bid</i>
2.42	3.33	37.6
1.97	2.47 structural steel	25.4
1.98	3.13 castiron work	58
2.43	2.91	15.6
2.28	3.00	29
2.15	2.97	38.1
2.6	3.51	35.0
2.17	2.75	26.7
3.12	3.64	16.6
4.2	6.10	45.2
2.19	2.60	18.7
2.50	3.04	21.6
2.60	3.15	21.0
2.80	3.54	26.4

Plain mass concrete is another article upon which it might be reasonable to expect some uniformity of unit prices. The following table shows the maximum and minimum bids submitted in thirteen different cases. The prices are per cubic yard, and the difference and percentage of difference are stated.

<i>Maximum</i>	<i>Minimum</i>	<i>Difference</i>	<i>Per cent difference</i>
\$12.00	\$8.50	\$3.50	41.2
10.00	7.30	2.70	37.0
17.00	6.75	10.25	152.0
6.75	5.00	1.75	35.0
8.00	6.00	2.00	33.3
11.30	6.50	4.80	73.9
7.50	5.50	2.00	36.4
7.00	5.40	1.60	29.6
9.00	6.70	2.30	34.4
7.50	6.00	1.50	25.0
7.75	6.00	1.75	29.2
9.60	8.00	1.60	20.0
10.00	7.50	2.50	33.3

The following table discloses the difference between the maximum and minimum bids for six cases of ordinary brick pavement per square yard, the specifications being the same in each case:

<i>Maximum</i>	<i>Minimum</i>	<i>Difference</i>	<i>Per cent increase</i>
\$3.00	\$2.50	\$0.50	20.0
3.25	2.00	1.25	62.5
6.00	2.25	2.75	122.2
2.25	2.10	.15	7.1
3.40	2.00	1.40	70.0
3.10	2.72	.38	14.0

The following table discloses the bids received in seven cases for common earth excavation per cubic yard:

<i>Maximum</i>	<i>Minimum</i>	<i>Difference</i>	<i>Per cent difference</i>
\$1.25	\$0.42	\$0.83	197.4
.75	.35	.40	114.3
1.50	.48	1.02	212.7
1.60	.50	1.10	220.0
.62	.47	.15	31.9
1.00	.45	.55	122.2
.90	.63	.27	42.8

The following table shows the maximum and minimum prices per square foot in five cases for ordinary concrete sidewalk:

<i>Maximum</i>	<i>Minimum</i>	<i>Difference</i>	<i>Per cent increase</i>
\$0.25	\$0.15	\$0.10	66.7
.35	.16	.19	118.8
.45	.13	.32	246.1
.20	.15	.05	33.3
.40	.14	.26	185.8

The following table discloses the maximum and minimum bids for concrete curbing per lineal foot:

<i>Maximum</i>	<i>Minimum</i>	<i>Difference</i>	<i>Per cent increase</i>
\$0.50	\$0.15	\$0.35	233
.80	.25	.55	220
.90	.60	.30	50

We have gone at some length into the question of unit prices because of its tremendous importance in the valuation of property upon the theory of reproduction cost. We have shown how with the enormous quantities involved in large properties small variations in unit prices will make large differences in aggregate results, which must affect materially and very seriously the price to the public and the return to the company. The theory of reproduction cost as the value of the property is not one to be depended upon. However correct or incorrect in theory reproduction cost as representing the value of an existing property may be, it obviously can not be used so as to produce a result which is just and reasonable unless both the quantities and unit prices are reasonably satisfactory. In the case of many articles, unit prices are easily ascertainable. In the case of many other articles, and in the case of labor costs, as is shown above, they are extremely uncertain and produce results which are so discordant as to be amazing. In this case, the Company

claims the total value of its street mains to be \$2,854,299, and the total value of its services \$860,434: a total of \$3,714,733. This total value is based on the theory of reproduction cost. The total of all the other tangible property of the Company is claimed by it as only \$2,274,217, as against this \$3,714,733. Of this total, \$1,306,564 is for the matter of re-paving over mains and services, over \$1,000,000 of which is for paving performed after the mains and services were laid. Upon the reproduction cost theory this item can not be disregarded. Discussion of this matter elsewhere results in a total rejection of this claim for re-paving. The Company claims the reproduction cost of its street mains, including therein structural cost, engineering, supervision, and interest, to be the sum of \$1,849,324.

The foregoing discussion discloses that neither the evidence in the case nor the outside investigations undertaken by the Commission, nor both together, can afford any reasonable or satisfactory solution of what the actual reproduction cost of these mains would be. Any attempt to fix the same would not rise above the dignity of a guess, and that guess would be clouded and confused by the evidence before us. The Commission must decline to make such a guess. It has no evidence as to the general character and conditions of the soil to be encountered in making excavations; there is nothing to show how much clay, how much loam, how much hardpan, how much rock, how much gravel, would be encountered in the laying of 411 miles of pipe; there is nothing showing what the cost of labor would be. No engineer sworn before us knows anything about the conditions to be encountered of soil or obstructions in the streets. The actual costs referred to by the engineers sworn in the case are costs incurred under conditions which may or may not be the same as those in the streets of Buffalo. Actual costs when obtained in other cities are practically as discrepant as the estimates of engineers; and in fact it must be that actual costs are discrepant to a great degree, since the esti-

mates of engineers are necessarily based upon actual costs which have come within their experience and observation. All of the engineers whose estimates are given are straightforward, competent men, and they had a right to rely upon their experience. Their experiences have varied, and what the experience would be in re-laying 411 miles of pipe in the city of Buffalo under various conditions of traffic, soil, and obstructions under the surface of the soil, no man knows or can know within a variation of hundreds of thousands of dollars. For these reasons, the Commission is unable to find definitely what the fair and reasonable reproduction cost of these mains would be.

COST OF CAPITAL

In its estimate of the reproduction cost of its property the Company submits an item for cost of capital, \$1,088,175. It arrives at this figure in the following manner. The sum total of all other reproduction costs of the property is \$6,166,325. It assumes that that amount of money would be required to reproduce the property, the money to be secured by the issue of bonds. It assumes that the bonds would have to be sold at 85 per cent of their face or par value. In order to produce the sum of \$6,166,325 by the sale of bonds at 85, bonds to the amount of \$7,254,500 would have to be issued. The discount of 15 per cent would equal the sum of \$1,088,175, which is the assumed cost of capital.

The practical results of an allowance of this item as a part of the reproduction cost would be as follows: The \$1,088,175 being a part of the fair value of the Company's property must be allowed, under the decision in the Consolidated Gas case, a return of 6 per cent per annum. Anything below that would be confiscation. This 6 per cent per annum would be \$65,290.50. Hence the Company's revenues would be swelled by that amount.

Upon the amount of gas sold at the present time this would involve an increase in the rate per thousand cubic

feet of approximately 8.8 cents. Upon the amount which is sold to the City of Buffalo the gross amount each year would be approximately \$11,650.

A curious result of this method of obtaining reproduction cost should not be overlooked. The assumption is that the entire reproduction cost is \$7,254,500. Upon this the Company is entitled to a 6 per cent return, which would amount annually to the sum of \$435,270. If the plant were constructed entirely with the proceeds of bonds according to the assumption given above, and such bonds bore 5 per cent interest, as is a further element of the assumption, the annual interest charge would be \$362,725. This produces the following result:

Returns paid by the consumer at 6 per cent.....	\$435,270
Interest paid by the Company upon capital.....	362,725
Excess retained by the Company.....	\$72,545

This is 1 per cent upon \$7,254,500, and to produce it upon the present gas sales would require an addition to the rate of approximately 12 cents per thousand cubic feet.

This would be a return to the stockholders of the Company without having invested a dollar in the property.

Such results as the foregoing would seem to demand that good reasons should be adduced in favor of this item for cost of capital before it can be allowed. The only reason submitted by the Company in favor of this allowance is that if a new plant identical in all respects with the existing plant were to be constructed, it would be a cost which would have to be borne by the corporation or its stockholders.

There is no proof that any such cost or any part of it was incurred at any time by the people constructing the existing plant, and upon a fair view of the history of the constituent companies the evidence is overwhelming that no such cost was ever incurred. The evidence is also conclusive as hereinbefore set forth that the parties investing their capital in the plants of the constituent companies have been abundantly rewarded for all the capital they actually put in. There is no proof that anyone is proposing to reproduce the

existing plant; and it is certain that if the present plant were wiped out and a new gas plant in the city of Buffalo were to be constructed, it would not be a reproduction of the present plant. It is equally certain that if any person were proposing to purchase the present plant, this item of cost of capital would form no part of the basis of the offer. This follows from the fact that neither of the parties who were proposing to buy the plant in 1897 figured into their estimate of value any such sum. The syndicate represented by Dr. Humphreys was ready to pay \$4,500,000. If we assume that \$1,000,000 of this was cost of capital, we would leave all the other aggregates of cost at that time only \$3,500,000. It is quite clear from the foregoing figures submitted that cost of capital did not cut any such figure in 1897 as it does now.

It is true that in authorizing stock and bonds for the construction of a new plant a reasonable amount for the cost of capital is allowed by the way of discount on bonds, by this Commission. It is also true that under the rules laid down in the uniform system of accounts prescribed by the Commission, such cost of capital is to be amortized from earnings during the term of the bonds. It is an actual expense incurred by the company for which it must receive a return.

In the present case, no such expense has been incurred by the Company, and that it should be permitted to receive a return of \$65,290 per year for an expense which it never incurred is not entirely harmonious with our ordinary notions of justice and reasonableness. When we add to this the fact that the persons who put in the capital which constructed this plant received more than abundant returns thereon — returns which ran as high as 15 to 17 per cent per year — and then add to that capital actually put in the sum of \$1,000,000 in order to entitle them to further returns thereon, we have something which would seem to demand no further discussion.

LEGAL AND ORGANIZATION EXPENSES

The Company submits as a part of the reproduction cost of its property the item of legal and organization expenses, \$61,052. This amount is reached by assuming that the cost of all the property before reaching this item is \$6,105,273, and then the legal and organization expenses are assumed to be 1 per cent of this sum, or \$61,052. There is no proof whatsoever that the legal and organization expenses of the new company would amount to this sum. There is no proof that the legal and organization expenses of the constituent companies amounted to any such sum, or to any sum which is not fully represented in the capital stock of those companies. There is no proof of the reorganization expenses which were incurred in the consolidation of the constituent companies, even if it be assumed that such expenses were a proper charge to capital account. Beyond the bare expression of opinion, possibly, that this is a fair amount as compared with actual expenses elsewhere, without proving in any respect what the expenses were or the circumstances under which the services were performed, there is nothing to justify a 1 per cent charge, more than there would be to justify a 2 per cent charge or one-half of one per cent charge. It is possible that in some view of this case an item should be allowed for organization expenses. That will be more properly discussed in connection with such items generally in the case of a company which has been long in existence, and reaping great profits in the past, as is the case with this Company. The item as it stands should be disallowed, without however at this time passing upon the question of whether some amount should not be considered.

NATURAL GAS COMPETITION

A great deal has been said in this case regarding the effect upon the Company of competition in the sale of natural gas for illuminating purposes. The material facts appear to be substantially as follows:

Natural gas was introduced into Buffalo about the year 1888. The franchise granted to the Natural Gas company by the City prohibits the use of natural gas for illuminating purposes. As a matter of fact, all residents of the city of Buffalo taking natural gas use it for illuminating if they so desire. It comes in direct competition with the manufactured gas supplied by the applicant on a large number of streets. It is sold at 30 cents per thousand cubic feet net, and makes a desirable illuminant when used with a Welsbach burner. The Company has lost many consumers by reason of this competition. It has, however, extended its mains since 1896 to 1910 a distance of only about 66 miles, and this presumably in the outlying districts as the city has grown.

The effect upon the gas output of the Company and its revenues can best be seen by the following figures: In 1889 all the constituent companies had 12,606 meters in use, and their net sales amounted to 402,402,020 cubic feet. The consumption of manufactured gas increased steadily from that time on until 1896, when the number of meters in use of all the constituent companies was 17,906, and the sales amounted to 633,540,816 cubic feet. This year of 1896 showed the maximum amount of sales by the three constituent companies. In the year 1897 there was a drop of some 19,000,000 cubic feet from 1896, and in 1898 the sales amounted to 561,709,985 cubic feet; and in the year 1900 the lowest point was reached of 15,580 meters in use with sales of 506,295,178 cubic feet.

There is nothing in the evidence which shows what occasioned this falling off at that time, but it may be assumed that it was owing to extensions of gas mains by the Natural Gas company. Nothing else has been brought to our attention which would explain the considerable change. From that time on there has been a steady increase in sales until in the year ended December 31, 1910, the sales amounted to 633,515,753 cubic feet.

A comparison of the business of the Company in 1910 with the business in 1896, the maximum amount reached before the natural gas competition reached its highest point, is shown by the following comparative table, in thousands of M cubic feet:

	1896	1910
Private consumers.....	531,271	510,060
City lamps.....	89,975	97,271
City buildings.....	11,701	26,185
Total sales.....	632,948	633,516
Used by company.....	3,136	4,003
Unaccounted for.....	73,977	107,044
Total sent out.....	710,062	744,563
Receipts from sales.....	\$638,292	\$625,502
Meters in service.....	17,651	20,123
Miles of mains.....	345	411

It will be seen from this table that the total sales of gas in 1910 were very slightly in excess of those in 1896. The total send-out was larger owing to the large amount of unaccounted for gas. The receipts from sales were nearly \$13,000 less in 1910 than in 1896, but this is owing to the fact that in the latter year the gas sold to the City was charged at 95 cents per thousand cubic feet, and in 1896 at \$1 per thousand. The number of meters in service had increased from 17,651 in 1896, to 20,123 in 1910.

Practically, therefore, the business in 1910 was of the same magnitude as that of 1896. The report of the Company for the year 1911 shows a still further but slight increase.

WORKING CAPITAL

The Company in its brief and in all of its calculations assumes that it has a working capital of \$150,000 upon which it is entitled to a return. It seems to be necessary to call attention to the fact that working capital consists of property of some kind owned and used by the Company in its business which is not elsewhere inventoried and appraised, and that if it has not any such property there can be nothing in the nature of working capital which can be placed in the inventory and upon which a return can be based. This remark is necessary in view of the fact that the Company's

exhibit showing how it arrives at the sum of \$150,000 working capital concludes as follows:

Amount required to bring net working capital up to \$150,000, \$110,510.65.

The witness called by the Company in explanation of this exhibit says, among other things:

In other words, I feel that we should have free as liquid capital to conduct this business not less than \$150,000, and if we do not have it, and we have not at the present time because we have exhausted it, as I will explain, etc.

He again says, at page 1063 of the evidence:

We have used up practically all of our working capital.

This evidence would seem to dispose of the question of working capital without further discussion, but a few other facts should properly be considered in this connection. The exhibit placed in evidence by the Company is too voluminous to quote in full at this place. It does, however, contain the following:

Quick assets exceed floating debt, \$39,489.35.

This would show that the Company actually has practically \$40,000 of working capital, providing the statement is made on the correct basis and embodies correct figures. Also it contains an inventory of stock, materials, and supplies on hand, showing that all are inventoried at the sum of \$71,743.95. Stock, materials, and supplies on hand clearly constitute working capital, and might very well be treated as such in this connection but for the fact that upon the other side of the account the Company has bills payable amounting to \$75,000, and it charges in its operating expenses the interest upon these bills payable at 6 per cent. It is clear that if this interest is allowed in operating expenses there can be no allowance for the stock, materials, and supplies as working capital. If the latter are allowed as working capital, then the interest charged in operating expenses must be stricken out so that the matter is, as the witness says, "six of one and half a dozen of the other".

It will be simpler to leave the interest in operating expenses, and therefore the stock, materials, and supplies can not be treated as working capital. The exhibit is not made up, however, on the correct basis. The quick assets exceed the floating debt by \$39,489.35, and this is assumed to be working capital. The assets, however, contain the following:

Treasury bonds covering plant paid for from working capital, \$95,000 par value. Market price, 64: \$60,800.

The treasury bonds are the bonds of the Company which have never been issued and hence are not an asset at all. The statement quoted shows clearly that they are placed in the exhibit representing "plant paid for from working capital," and hence the amount is necessarily included in some other place in property which is inventoried and allowed for. This of course is a fundamental error, since nothing should appear in working capital which is inventoried elsewhere. As a conclusion from this, the quick assets do not exceed floating debt but are less by some \$21,000.

The statement is also faulty in principle in other respects, but it is unnecessary to go into it, since the Company has entirely failed to show any working capital in use except stock, materials, and supplies which are hereinbefore discussed.

In this connection it should be observed that the balance sheet of the Company for the year ended December 31, 1911, discloses that it then had consumers' deposits to the amount of \$78,390.57. This is not held separate and apart as a trust fund but is represented somewhere in its floating capital, so that very clearly it has a working capital to the amount of these deposits. It is true that it is liable for interest upon these deposits, but that interest when paid may, for the purposes of this case, be treated as part of operating expense, so that to all practical intents and purposes it has this amount of working capital on hand.

PEOPLES GAS LIGHT AND COKE COMPANY PLANT

The history of the acquisition of this plant has been hereinbefore given in full. The Company values this plant at \$558,670. The following is a statement of the details of the valuation:

Land.....	\$60,000.00
Buildings.....	67,824.58
Manufacturing apparatus and holders.....	287,172.00
Mains.....	60,715.89
Services.....	3,794.00
Meters.....	1,785.00
Re-paving over mains.....	11,255.00
Sundry intangibles.....	68,123.53
Total.....	\$558,670.00

It treats this plant for all the purposes of this case precisely as though it were the owner, whereas the City claims that the plant should practically be thrown out of consideration. The question involved is peculiar and exceedingly difficult of solution in a just, reasonable, and satisfactory manner.

The property is not owned by the Company. It is owned by a corporation, the Peoples Gas Light and Coke Company, nearly all of whose stock and bonds are owned by the Buffalo Gas Company. That Company is a lessee of the property, paying as rent the taxes and the up-keep. Technically, the Buffalo Gas Company might be treated as lessee and credited in the expense of operation with the amount of rental paid. Since, however, the separate corporate identities are maintained for reasons which have no particular relation to the merits of this case, it is probably better to treat the situation as though the Buffalo Gas Company owned the property instead of owning the stock and bonds of the owner. If all of the stock were owned by the Buffalo Gas Company, it could merge the Peoples Gas Light and Coke Company and then the situation would be exactly what the Company now claims it to be. A mere change in the technical relations ought not to make any change in the merits, and does not so far as I can see.

The Company claims that the plant is used in the service of the public and is a necessary integral part of the plant.

and therefore it is entitled to a return upon its fair value. On the other hand, the City strenuously urges that "the Peoples plant should not be saddled on the consumers of gas but should be disregarded *in toto*; it is not necessary and is not necessarily used in its business".

The plant is located upon a parcel of land consisting of about 6½ acres situate in the northern part of the city and about 3½ miles from the coal gas generating station at Genesee street. The following is a list of the buildings thereon, with the depreciated values attached to them by Mr. Byers:

Purifying house.....	\$23,732.13
Engine room.....	4,498.60
Generating and boiler room.....	20,391.82
Office and meter room.....	15,759.02
House near Steel company.....	689.63
Foundation for stack.....	1,658.00
Fence.....	1,095.68
Total.....	\$67,824.58

There is a storage holder of the capacity of 1,750,000 cubic feet, a relief holder of the capacity of 150,000 cubic feet, and a carbureted water gas set with accessories. The capacity of this water gas set is not clear. Mr. Palmer, the Company's engineer, states that it is 800,000 cubic feet per day. The annual report of the Company states that the 24-hour capacity is 1,600,000 cubic feet with coke for fuel, and 2,000,000 cubic feet with coal for fuel. It is probable that Mr. Palmer had in mind a 12-hour day in stating the capacity at 800,000.

It is claimed that the Company has 38,891 feet of mains, valued by the Company at \$54,699. The greater portion of these mains are large size trunk mains extending from the generating plant. There are 17,944 feet of 12-inch main, 4267 feet of 16-inch main, 2011 feet of 24-inch main, and only 3300 feet of 4-inch main, which size constitutes so large a proportion of the mains of the Buffalo Gas Company. It is claimed that there belong with this plant 258 complete services of the value of \$3794, and 277 meters of the value of \$1785.

It does not appear what use was made of this plant, if any, subsequent to 1898, to the year 1906. Since that time there has been some use of it made. The storage holder has been used for the storage of gas, and water gas has been generated in small quantities as follows, the mains being in thousands of M cubic feet per annum:

1906.....	41,688
1907.....	11,789
1908.....	000
1909.....	16,626
1910.....	37,294
1911.....	9,538

The cost of generating this gas has been very great as compared with that of coal gas. The figures submitted by the Company show the exact cost per thousand feet of this gas in the holder. Applying to the distribution and other expenses the same rate as to other gas, and also apportioning the maintenance charge paid for the up-keep of the plant, the total expense of operation connected with this gas is 85.71 cents per thousand cubic feet, as against practically 56 cents for the entire send-out of the company.

Water gas has been manufactured very intermittently. The following table shows the maximum send-out in any one day of coal gas, water gas, and of both combined, for the years 1909, 1910, and 1911:

	Coal		Water		Both	
	<i>Cu. ft.</i>	<i>Date</i>	<i>Cu. ft.</i>	<i>Date</i>	<i>Cu. ft.</i>	<i>Date</i>
1909.....	2,508,000	Jan. 2	432,000	Dec. 31	2,826,000	Dec. 11
1910.....	2,680,000	Dec. 14	444,000	Jan. 22	3,032,000	Dec. 2
1911.....	2,635,000	Jan. 21	439,000	Dec. 15	2,972,000	Jan. 14

The total holder capacity owned by the Buffalo Gas Company is

	<i>Cubic feet</i>
Genesee Street plant.....	1,337,000
Forest avenue.....	1,000,000
East Ferry street.....	500,000
Elk street No. 3.....	525,000
Total.....	3,362,000

The holder capacity at the Peoples works is 1,750,000 cubic feet. So the total holder capacity of the Company, including that of the Peoples plant, is 5,112,000 cubic feet, with a maximum daily production of some 2,800,000 to 2,900,000 cubic feet.

It is practically conceded that the plant is badly located from an engineering point of view. The holder is some $3\frac{1}{2}$ miles from the generating station at Genesee street, and is only about half a mile from the large holder with 1,000,000 feet capacity at Forest avenue. The greater portion of the mains appear to be excessive in size for the purposes for which they are used. The buildings are altogether disproportionate in size to any use required of them. The land is largely in excess of any amount that is needed for holder station, and a personal inspection of the property shows that comparatively little of the buildings is needed for the generation of water gas. The station meter is a duplication.

It is, however, a fact that a water gas plant of small capacity in connection with a plant principally generating coal gas is good practice, and that such a water gas plant serves a useful purpose in taking care of the peak of the load and also in other emergencies. It is testified by witnesses for the Company that the Company could not have dispensed with this water gas plant owing to its necessity at times in supplying the needed amount for daily consumption.

It is conceded, however, that the holder capacity of the Company, including the holder at Bradley street, is excessive; and it is not satisfactorily shown that the holder capacity owned by the Buffalo Gas Company is not equal to all of its present needs and that it would also be equal to some increase in daily consumption.

There can be no question that the water gas plant, for economical and proper administration and cheapness of operation, should be placed near the coal gas plant in conjunction with which it is to be operated. The vacant land at Genesee street is sufficient for the accommodation of such a plant and for the relief holder connected therewith. It may be properly assumed that the Peoples plant is to some extent in the public service, and therefore that the Company is entitled to some allowance for it.

It is well settled in our judgment that no allowance need be made in a rate making case for unnecessary expenditures, either in construction or in management. Such would appear to be the view of the Supreme Court in *Reagan vs. Farmers' Loan and Trust Company* (154 U. S. 362), *Stanislaus County vs. San Joaquin, etc.* (192 U. S. 201), *San Diego Water Company vs. San Diego* (118 Cal. 556), and other cases unnecessary to cite.

Some general considerations as to whether the Company should be allowed a return upon the full reproduction cost of this property are as follows:

At the time of the purchase in 1898 it is clear that those representing the Buffalo Gas Company did not consider the Peoples plant necessary to their gas making and distributing operations. They had at that time two or three generating plants of their own, and of sufficient gas making capacity, as shown by the fact that they have demolished the generating plants of the Mutual and Citizens companies. In defending their purchase before the courts there is no statement by any affiant that the plant was needed in their business. Their holder capacity was sufficient without the storage holder at the Peoples plant, as is shown by the fact that two of the holders at Elk street have been and are entirely disused and the holder of the Citizens plant has been torn down. It is true that these holders are differently located with reference to gas consumption than that at Bradley street, but there is no evidence in the case which shows that the holder at Forest avenue is not entirely sufficient in capacity to supply the part of the city which is served by it; and the witnesses for the Company admit that it is bad engineering practice to have the two holders so near together, constituting, as they do, over one-half of the entire holder capacity of the Company.

The buildings and generating plants are entirely out of proportion to the use which has ever been made of them by the Company. The statistics as to production show that the

use in generating water gas is extremely small as compared with the total output; and for one period of over a year no water gas whatever was generated at this plant. There can be in my judgment no justification of the expenditure of over half a million dollars for the purposes which are served by the Peoples plant.

It is urged that the Company was required to purchase this plant in self-protection, and therefore that it should be allowed at least the fair value of the plant. This brings us directly to the question whether, when cut-throat competition is threatened to a company, it has a right to protect itself against such competition and charge the expense of such protection up to the public. If such competition continued, the stockholders of the company would suffer loss by a reduction in their dividends, owing either to less sales or smaller prices, or both. It was to protect their hoped for dividends and the value of their property that induced the directors of the Buffalo Gas Company to purchase the Peoples plant property and issue securities therefor to the amount of over \$2,250,000. If it be held that the public must bear the burden, then it necessarily follows that the public is an insurer of the Company against all loss whatsoever, and that the Company is entitled to a return upon its property of a reasonable amount however and for what purpose acquired, and that the public must pay it, irrespective of any other consideration. If it be held that the plant was bought merely for the purpose of protection of dividends and the public is charged with the payment of the cost, then the principle clearly is that the people of Buffalo, without any opportunity to protect themselves, without having had any opportunity to prevent the construction of the Addicks plant, must bear the burden of its construction, and not reap the benefits of the lower price of gas to them which would follow from an active competition. In other words, in order to keep up the price of gas and thereby maintain its dividends, the existing Company had the right

to buy up the competitor which was offering a lower price, and then charge the cost of the purchase to the public, and thus increase the price which it would be compelled to pay for gas. The amount for which the Company seeks to have credit in this case is \$558,670. This makes a difference in the rate of $5\frac{1}{2}$ cents per thousand cubic feet upon the basis of the present consumption; so that practically the question is, shall the public pay 5 cents a thousand cubic feet more for its gas than it otherwise would if the Gas company had not thought fit to buy out Addicks and his plant for the purpose of protecting itself against the effects of competition.

It is clear that the public should be required to pay a return only upon a plant which is suited and adapted to its needs, with of course a reasonable allowance for future expansion and growth, which is just as important for the public as it is for the company; and if a given plant is not suited and adapted to the needs of the public which it serves, but is more extensive in capacity than is reasonably required for such needs and reasonable development in the future, or if it has been extravagantly constructed, then clearly, and upon the plainest principles of equity and justice, the company should not be entitled to a return beyond that which would be demanded upon a plant properly located, economically constructed, and suited in capacity to the needs for which it is designed.

There is no direct evidence in the case as to the cost of an accessory water gas plant sufficient in capacity to operate successfully in conjunction with the coal gas plant in taking care of the peak of the load and cases of emergency. There is, however, evidence as to costs, and evidence as to requisite capacity of such an accessory plant sufficient to enable a fair and reasonable judgment to be formed as accurate and perhaps more accurate than any estimate in the case as to the cost of reproduction new of the existing gas plant. Such cost will vary with the differing conclusions

which may fairly be reached as to the capacity required. The maximum amount may be placed at \$150,000, and there seems to be no sufficient reason for attempting to whittle the sum below this; while on the other hand we can find no reason for making it larger in view of the law as we understand it laid down in the cases above cited.

REASONABLE VALUE OF THE COMPANY'S PROPERTY

In the case of *Willcox vs. Consolidated Gas Company* (212 U. S. 19), the Supreme Court of the United States declared that in rate cases "there must be a fair return upon the reasonable value of the property at the time it is being used for the public". This was the enunciation of the rule which had been laid down by the same court in the previous cases which were recited by it and to which further reference is unnecessary. Whether the rule should have been laid down in this language may be a question for debate. There certainly may be advanced considerations which would tend to modify the rule materially, and which might, if there were a tribunal properly authorized so to do, shake its authority materially; but at present the rule has the force of law and must be observed.

This brings us to the question which, under the rule stated, is the paramount one in this case: What is the reasonable value of the property used by the Company in the public service? An infinite amount of discussion has taken place in the opinions of courts and commissions and in the writings of those interested in the subject as to what is the test of value, and by what rule, theory, or evidence it can be determined in the case of properties used in the public service.

In the case of the Westchester Street Railroad Company this Commission pointed out the dangers arising from the use of the term "value" in different senses, and also called attention to the fact that value merely expresses the circumstance of a thing exchanging in a certain ratio for some

other thing. The value of any article in economics means its power of commanding other articles in exchange. It means simply the rate at which the article will exchange for other articles. The rate at which it will exchange for other articles depends entirely upon the mind of the purchaser, of the one who desires to obtain the article in question. To ascertain the value of an article is to ascertain how much a prospective purchaser would part with in order to obtain its possession and ownership. As was said in the Westchester case, value is nothing intrinsic in things, but simply the temporary measure of the general average desire for them at the moment. It is subjective, inherent in the mind which conceives it, and not in the object of which it is conceived. The qualities of an object make it an object of desirability to those who have it not and who can not acquire it without parting with something which they have in exchange therefor. The terms on which the exchange is made constitute the ratio of exchange. This ratio is ultimately fixed by demand, and demand is determined by the intensity of desire.

The necessity for fixing the reasonable value of properties used in the public service has therefore brought numerous theories as to the method to be employed. There are several leading theories as to method, with considerable variations as to detail in each method. The principal method which is employed at the present time, and which seems to be gaining favor rapidly, is what is known as the cost of reproduction new theory: the one upon which this case has been tried. Others are the original cost theory, the cost of duplicating the service theory, and what has been termed the continuous property theory.

It is a question whether any of these theories can be applied alone to a given case and produce a result of substantial justice and equity. It certainly requires examination as to whether any one of them takes into consideration all the evidence which necessarily determines value and gives

them their appropriate weight and consequence. It will be useful to consider the practical working of these theories with reference to the present case and in the light of facts hereinbefore developed.

Since the cost of reproduction new is the theory upon which the case has been tried by the parties, it will be well to consider that first. It has to some extent been considered with reference to its practical application in the discussion of particular items. An objection to this theory is the practical impossibility in many cases of ascertaining with any reasonable degree of accuracy the cost of reproduction new. The cost of reproduction new depends upon a large number of uncertain and variable factors. It depends upon the efficiency of labor, the cost of materials, the wisdom and judgment of the superintendents, weather conditions obtaining during the process of construction, unforeseen delays from accidents which may and will arise in every case, and upon special conditions which can not be known or foreseen in large numbers of cases. One special condition which it is impossible to determine in this case is the character of the soil in which pipes must be laid. This character of soil necessarily affects, as has been shown, to a very large extent the total cost of reproduction, and the differences would amount to a very large sum, as has been shown by the figures which are given. Estimates of engineers, estimates of contractors, and actual experience afford no criterion by which the cost of reproduction new can be determined in many cases, since none of them can possibly take into consideration all of the factors which would influence such cost.

Another element in the case of reproduction new which is exceedingly variable is the cost of materials. It is difficult to take proper account of such fluctuations and apply them justly and equitably in any given case. As has been shown, the price of castiron pipe for mains fluctuates enormously. The price in one year is rarely the price in either the preceding or succeeding year. A valuation made in the case of

this Company in 1907 would produce vastly different results from a valuation made in 1912, owing to the different prices of pipe, and yet there can scarcely be any disagreement upon the proposition that the price of gas in 1907 and 1912 should be substantially the same. A condition of things which permits the public to appeal to this Commission to fix the rate in times of financial distress, when materials are low and labor is cheap, and thereby obtain a low rate which shall obtain permanently or substantially so; and on the other hand, which permits the company to appeal to the Commission to fix a rate in times when labor is high and materials are dear, and thereby to fix a higher rate to continue with substantial permanency, is intolerable. If this Commission were to fix the price of iron pipe upon the prices now prevailing, next year they may be 50 per cent higher. Justice would require that the rate go up if the cost of reproduction new is to prevail; while on the other hand, if pipe gets lower the rates should be lower. This would require a constant juggling with prices in order to carry out what would be deemed substantial justice.

The third objection to the cost of reproduction new is that it calls for the reproduction of an article which, it might be said, nobody would ever reproduce. It would demand the valuing of obsolescent machinery and appliances. A prospective purchaser of a property, in determining what he could afford to pay for it, obviously would not take into account so much the cost of reproducing the property as the cost of reproducing the service. New inventions and new improvements might make it possible for the prospective purchaser to produce a plant which would render precisely the same service at one-half the cost which would be required to reproduce new a plant which would duplicate the existing plant.

Suppose it were possible to produce a main equally efficient for the transmission of gas with an iron main, at a cost of \$5 a ton instead of \$25 a ton. No one in purchasing

an iron main laid in the ground would then pay for it at the rate of \$25 per ton, and would only assume a cost of \$5 per ton; and yet upon the cost of reproduction new theory, the valuation would have to be given to it by the Commission of \$25 per ton, the cost of the iron pipe. A fundamental objection to the theory is that it puts upon the public the burden of paying a return upon obsolescent, inefficient machinery which may happen to be in service at the time of the valuation.

Another serious objection to this theory, and one which in some cases is insuperable, is that it does not take into consideration elements which can be of controlling force in determining value. This case affords a most excellent illustration of this proposition. If cost of reproduction new is to obtain, it leaves out of view entirely the effect of the competition of natural gas and of electric light. It proceeds upon the assumption that the Company is fairly and reasonably entitled to charge precisely the same rate as it would be entitled to charge if natural gas and electricity were not supplied to the people of Buffalo for the purpose of affording light, heat, and power. It is assumed that the reasonable value of the property is the cost of reproduction new. If this be so, the element of competition by other agencies which can give service in producing light cuts no figure whatsoever. Now, no person will contend for a moment that the existence of natural gas in Buffalo does not seriously and to a very large extent affect the value of the property of the Buffalo Gas Company. It appears that in street after street where the Company was supplying gas in considerable quantities to consumers, upon the laying of natural gas mains it lost every customer, the consumer going at once for natural gas. The cost of the plant of the Buffalo Gas Company is of no interest to the consumer. The point with him is upon what terms he can obtain a satisfactory lighting service. It is the service that he is paying for, and not the plant; and if he can get his house lighted with gas

at 30 cents a thousand he will not pay \$1 a thousand, other things being equal.

The competition of electricity has had a serious effect upon the value of gas properties, and would have ruined many had not new uses for gas come into vogue. Formerly it was used chiefly for lighting. Now the larger consumption in many places is for heating, cooking, and the like. It is a common remark, whether true or not, that the purchasers of the three gas plants in 1897 failed to take into proper consideration the effect of the competition of natural gas upon the value of the property they were purchasing. The natural gas plant in Buffalo is an exceedingly profitable property. If, however, the Buffalo Gas Company could devise some means by which it could deliver gas into its mains at 5 cents per thousand, it would take the business, and the value of the Iroquois Natural Gas Company's property would instantly fall off. The cost of reproduction new theory entirely ignores this element, which has more potency in determining the value of the property of the Buffalo Gas Company, perhaps, than any other one which can properly be considered.

The present consumption of gas furnished by the Company is approximately 600,000,000 cubic feet per year. If upon the theory of cost of reproduction new the value of the plant should be fixed at \$5,000,000, that would demand upon a 6 per cent return earnings to the amount of \$300,000 per year in order to afford a fair return upon the value of the property. Upon the actual production of 600,000,000 cubic feet per year, this would require the consumer to pay 50 cents per thousand cubic feet; and this would be the sum which we would be obliged to fix in this case if we found the value of the property to be as stated. Suppose for a moment that the Iroquois Natural Gas Company should extend its mains into every street now occupied by the mains of the Buffalo Gas Company with the same effect which like extensions have had in the past, and the consumption should

fall off during the year 1913 one-half, so that the total amount of gas sold by the Company would be only 300,000,000 cubic feet: the Company would be entitled to precisely the same return, upon this theory, upon its property, and hence it would be fair and reasonable that the consumers of manufactured gas taking 300,000,000 cubic feet should pay the \$300,000 return, or \$1 per thousand cubic feet. This added to the cost of production shown by the Company would make the price of gas about \$1.58 per thousand cubic feet.

It is unnecessary to enlarge further upon whether or not this theory is reasonable as applied to this case. If the Commission were to fix the price under such circumstances at \$1.58, it would be a most laughable performance, since the consumers would not take gas at that price and the Company would simply lose all the business it had. I entertain no doubt whatsoever that the foregoing considerations conclusively dispose of the contention that this case must be disposed of solely upon the theory of cost of reproduction new.

Another consideration against the application of this theory is that it requires the use of certain percentages for engineering, superintendence, and the like, which are purely theoretical as applied to the existing plant for the reason that they were never incurred by the Company. If a new plant were to be constructed as an entirety, and all to be put in operation on a given day, it is unquestionable that there would be engineering charges and superintendence charges which would necessarily be reckoned as a part of the cost. We need not pause to consider whether there should be a percentage allowed for this, or whether there should be an attempt made to ascertain the actual cost of considering the number of engineers and superintendents and their probable salary, or whether some other method of reaching a conclusion as to the cost should be taken. The fact remains that in this case there is no claim that in all

the extensions and improvements which have been undertaken for years there has been any such charge made to or paid by the Company. All the cost of engineering and superintendence, so far as it is disclosed to us, has been taken care of in precisely the way that it is usually taken care of by an existing company: namely, the engineers and superintendents have been employees of the Company upon a salary, and the salary has been charged to operating expenses, and the operating expenses have been paid by the public. The plant of the Buffalo Gas Company is a growth. It had a small beginning in 1848, and has grown with the growth of the city. A few miles of mains have been laid each year, and probably there have been but very few years in the past sixty in which there has not been an extension of the mains. All of this has been done presumptively under the direction and superintendence of necessary employees of the Company who have been paid their salaries which have been charged to operating expenses, and therefore the public has paid for this engineering and superintendence. Upon the theory claimed by the Company in this case, the engineering and superintendence amounts to hundreds of thousands of dollars. To assume that the sum, whatever it may be, is something upon which the Company is entitled to a 6 per cent return, is to assume a thing which is unjust and unreasonable in the extreme. It would make the public in Buffalo pay a return in perpetuity for that which has already been paid for by previous consumers. That this would be an injustice was clearly recognized by the witness Luqueer in one case, and it is so obvious as to require no further discussion.

We must hold, therefore, in the light of the foregoing considerations, that the determination of the rate for gas to be fixed by us does not depend exclusively upon the cost of reproduction new of the existing plant. If it were made to depend upon this, there would be further injustice. Some portions of the plant which are actually in use are obsolete,

although performing acceptable service at the present time. This is conceded, in fact, by the president of the Company in his evidence. He admits that the progress of the art has brought both better and more satisfactory appliances which are in use at the present time. The existing generating plant was all constructed substantially many years since. The case of the rectangular condensers, which was the subject of sharp controversy upon the hearings, is a fair illustration. The value involved is too small to permit of very extensive consideration, but the principle obtains. The rectangular condensers are not in use: they are obsolete, and no one would think of reconstructing them or of using them if building a new plant. It appears from the evidence that improvements have been made in the construction of purifiers. The surface condensers and the tower scrubber are other examples illustrating the same principle.

As before pointed out, the cost of duplicating the service, and not of reproducing the plant, is the fair test of value; or rather, to put it in strictly accurate language, it is the fair test of what would operate upon the purchaser's mind were he desiring to acquire the property.

We may turn now to the original cost theory. Theoretically, this has great attractions. Assume the case of a town having no gas service whatsoever, and that a gas plant thoroughly equipped, economically constructed, and in every way efficient, should be constructed for service. Obviously, the fair rate of return should be based upon the money put into the plant: that is to say, the original cost. Everyone would recognize the justice of this; and the rate would continue upon this basis undisturbed for long series of years. There are, however, many difficulties which would arise if this theory were adopted. The first one is a practical difficulty which is to a large extent insurmountable. In the case of many existing plants there is no practical way of ascertaining the original cost with accuracy. This is absolutely true in the present case. There are no records avail-

able, at least none known to the Commission, which show what the cost was. According to the evidence submitted, the books of the various companies were kept upon different theories, and did not, back in 1896, afford any proper indication of the cost. In addition to that, unless the cost of each item could be ascertained, it would be impossible to reach a conclusion in this case, for the reason that much of the plant which was originally constructed has been destroyed. The generating plant and holder of the Citizens company have been entirely destroyed. The generating plant of the Mutual company has also been demolished. The consolidation of the companies has probably rendered useless much piping which was necessary for their original operation. The review hereinbefore given of the probable cost of the constituent properties is, however, as reliable and satisfactory as the evidence concerning the reproduction cost of much of the property. It is sufficient to say that while we may approximate the original cost in this case, we can not determine it. While we may approximate the reproduction cost, we can not determine it.

There is another element which really determines the value of property when it is properly considered as a ratio of exchange, and it is impossible to consider value anything else. That element is earning power. Generally and broadly speaking, in the case of all properties which are used in producing a service which is sold, the value of the property depends upon the value of the service, and not the value of the service upon the value of the property. A prospective purchaser of a gas plant would give nothing for it except because of its earning power, present and prospective. If we could conceive of the entire population of Buffalo moving away and leaving the site of the city barren of inhabitants, the plant of the Buffalo Gas Company would have no value other than junk value. If we could conceive of all of the people of the city refusing to purchase gas, the same result would follow. If we could conceive of

one-half of the present customers refusing to take gas further, the same result would follow. And these results would follow simply and solely because the earning power of the plant is diminished. It is not the plant which the Company has to sell, it is light and heat: or in other words, service. If the demand for the service is large, and the price the consumer of the service is willing to pay rather than forego the service is liberal, the value of the instrument yielding the service is necessarily greater than it would be if the demand for the service is small and the price obtained meager.

If this consideration is valid, we must unquestionably in this case take into consideration, in fixing the value of the plant, the existence of the electric light and natural gas competition. This is so plain a business proposition that it really should require no discussion. There is no association of good business men having the requisite capital who would give the same price for this property — in other words, place the same value upon it — as they would if natural gas were not a competitor and if electricity were not a competitor.

These considerations bring us back to the rule laid down in *Smyth vs. Ames* (169 U. S. 468). In that case the court said what has been quoted thousands of times, namely:

We hold, however, that the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public. And in order to ascertain that value the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stocks, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience.

This rule authorizes, if it does not require, us to consider every element which has been hereinbefore discussed and all others which may have a fair bearing in determining the value. The difficulty which has puzzled many and which will continue to puzzle others until there has been an authoritative determination concerning value, is that in rate cases the earning power may depend upon the rate. If the value depends upon the earning power, how is it possible to make the earning power depend upon the value? Which is the antecedent and which is the consequent, is the question. Upon this subject it should be frankly recognized, that in fixing the rate the Commission does determine to a certain extent the value of the property, and this necessarily. This is the clear assumption in the decisions of the United States Supreme Court which hold that the rate can not be reduced so as to bring the rate of return below 6 per cent upon the assumed value of the property, because putting it lower than that would amount to confiscation. This means nothing other than that a rate of return of less than 6 per cent would lower the value of the property. If putting the rate at 3 per cent confiscates or destroys one-half the value of the property, putting the rate at 12 per cent would double the value of the property over that if the rate of return were 6 per cent, assuming that the consumption would remain the same at the increased price. If the Commission were to fix the rate of return in this case at 58 cents per thousand cubic feet, assuming that to be the operating cost as claimed by the Company, is it not true that the value of the property would be entirely destroyed and lost and that no purchaser would give anything for it with that rate; while on the other hand, if the Commission were to fix the rate at \$1.35 per thousand cubic feet, which is demanded by the contention of the Company and by the application of the cost of reproduction new theory, and the consumers were obliged to take it at that price, would not the value of the property be very much greater than what it is at present with gas selling

at \$1 per thousand cubic feet to the consumer and at a lesser sum to the City? I repeat, that a reëxamination of the question of what the value is and how it is to be ascertained in the fixing of rates by public service commissions is imperatively demanded and must sooner or later come.

If the foregoing discussion proceeds upon the right lines, it is apparent that the value of this property must be fixed like that of any other, as a matter of judgment and not as a matter of mathematical deduction. The same course precisely must be taken as is taken by those giving evidence upon the value of land. No one can say positively that a given piece of land has an exact value in dollars and cents. One can only compare it with sales of land in the vicinity and the general trend of prices and the probabilities of someone desiring to purchase the parcel in question within a reasonable time, the facilities which it offers for particular kinds of business, the character of the neighborhood in which it is situated fitting it for residence, for business, for manufacturing purposes, and the like. A thousand things enter into the estimate, and no one can assign an exact mathematical value to any one element. His final conclusion is reached as an act of judgment and not as an act of reasoning. No one in reaching such a conclusion, whether he values the land by the foot frontage, by the square foot, or by the acre, can demonstrate the correctness of his conclusion as to his unit price, because that is a conclusion which he reaches without the use of pencil and solely by the exercise of his faculties.

Men constantly differ as to the value of particular things which are in themselves units and not an aggregation of units. If one can ascertain correctly the value of a unit in an article which consists of an aggregation of units, the process of ascertaining the value of the entire article is easy; but as shown in the analysis of the cost of laying pipe, the differences come from the different unit prices adopted. For some articles there is no ascertainable unit price. In the case of a horse, one man places one valuation upon it; and another, other. The judgment of

each as to that value is made up by considering a large number of characteristics of the horse: his age, size, color, soundness, disposition, and the like; and yet to none of these elements which finally determine his judgment can he assign a definite value. It is the aggregation of them all in the horse which finally determines from his general experience the sum which he thinks the horse to be worth.

The assigning in this case of the proper weight to original cost, cost of reproduction new, effect of competition, and the like, is an act of judgment and nothing more.

The foregoing considerations point with almost irresistible force to the conclusion that what is called the fixing of the value of the property in the public service for the purpose of rate making, is not a fixing of value in any proper sense of that word as it is correctly used in our language. It is a determination of what under all the facts and circumstances of the case is a just and equitable amount upon which the return allowed to the corporation is to be computed. If the time the determination is made happens to be at or near the time the plant is put in operation, the investment or original cost may be the predominant factor. If the time of determination is remote from the time of investment, the factor of appreciation or diminution in values arising from changes in costs of labor and materials may enter largely into the result. If the plant is unreasonably disproportionate in size to the service required of it, the cost of reproduction new can not be the sole test. If the actual investment has been reckless and extravagant, the owners should bear the loss and not the public. If the general scale of prices and values in the community has been increased or diminished since the plant was built, the owners may be fairly called upon to share the general diminution; and on the other hand, may justly demand a share in the general appreciation to which the existence of their property has, it may fairly be assumed, contributed at least its proportionate share.

The problem arising from the competition of natural gas has been largely discussed in this case and demands attention at this point. The general facts from which that problem arises have been hereinbefore stated. The first observation which should be made upon this point is that we are called upon to note (1) that such competition does not affect the original cost; (2) that it does not affect the cost of reproduction new; (3) that it does not affect the physical deterioration; and (4) that it does not affect any of the elements upon which the determination is to be based as they are enumerated in *Smyth vs. Ames*, except the market value of the Company's stock and bonds, and probable earning capacity under particular rates prescribed by statute.

The second observation is that the existence of such competition does affect most materially (1) the exchange value of the plant, *i. e.* the price it would sell for in the market, since it would be assumed in any such sale to have a most material bearing upon the prospective earning power; and (2) the rate which the Company could charge upon its own determination, since the competitive condition could not be disregarded in considering how to retain as well as to add to the demand for the Company's service. These latter considerations are beyond the province of the Commission if it is to be restricted to cost of reproduction new or to original investment cost in fixing the amount upon which the return is to be had. Exchange value, which depends upon the rate charged for service, can not logically be taken into consideration when the rate itself is in controversy. The moment we attempt so to do, reasoning in a circle begins.

In the light of these observations it is difficult to see where natural gas competition cuts any figure in fixing the amount upon which a return is to be allowed. What influence, if any, it should have in fixing the rate of return is entirely another question.

Upon this question of rate of return there are several important but conflicting considerations. First, one element

of great weight is the risk involved to those investing in the business. Clearly, the greater the risk the greater must and should be the attractions offered by the profits to be gained. Hence it is elementary in these matters, the greater the risk the greater should be the return. This principle is basic in business operations. On the other hand, when the forces of competition come in play practically, the principle tends to be negative. If the price is made commensurate with the risk which is involved because of the competition with a company which has the advantage of a less cost of production or operation, such greater price operates to throw business to the already favored competitor, and the result tends to a compulsory lower price as a necessity in the effort to retain existing customers. Again, the public has never undertaken to guarantee a fixed return, nor indeed any return, to investors in a public service. It is good public policy to make the returns in such a service as secure as the nature of the case will admit, to the end that the returns may be reduced to the lowest reasonable point and thus the rate be as low as is possibly consistent with justice. But some risks the investor must always take. He must always have in mind the competition of a new and superior service produced at a less cost which will secure all the custom. Carriers by wagon simply have to drop out of business when confronted with the competition of canals and railroads. There is some difficulty in appreciating the equity which makes it just that a consumer on street A should pay an additional price for his manufactured gas because the company has lost a customer on street B who has gone over to the use of natural gas at a third the price for which manufactured gas can be afforded. If the consumer on street A were seeking to have the company supplying manufactured gas extend its service by the investment of new capital which would be exposed to the natural gas competition, he would have to recognize the risk and pay the requisite price. This difficulty is met in Buffalo in the case of private consumers who demand extensions of the Company's mains

which involve a possible or probable enlargement of its generating plant. The risk in such extensions has been great in the past. It would seem to be great in the future. But that precise phase of the situation is not before us now. The only customer to be considered directly is the municipality itself. It is not seeking or requiring an investment of additional capital by the Company. It is requiring service from capital which was substantially all invested before the natural gas competition reached anything like its present intensity of risk. Should the City bear the loss involved, whatever it may be, by paying an increased rate; or should the Company be the sufferer?

One consideration can not practically be overlooked, and that is that too great a price will drive customers of the Company to other sources of heat and illumination. When the Company itself appeals to us to fix the rate, this would seem to be legitimate matter for our reflection, whatever the case might be were consumers seeking to obtain a lower rate.

Another consideration which can not be lost sight of is that the Company itself, by formal written contract, furnished gas for five years at rates varying from 79 cents to 75 cents per thousand. What induced it to do this has not been disclosed. Brief comment will dispose of this fact so far as it has any proper relation to our decision. The operating cost per thousand is claimed by the Company to have been about 58½ cents, and this without a proper allowance for depreciation. Its evidence in this behalf is not particularly criticised by the City. If an addition of 3½ cents be made for amortization purposes, amounting in the aggregate to only about \$22,000, operating costs would be 62 cents per thousand. With a selling price of 75 cents this would leave 13 cents for return on capital. On the total output of 633,000 thousand cubic feet, the gross return to capital would be \$82,290, which capitalized at 6 per cent would amount to less than \$1,400,000. Whatever conclu-

sions may be reached as to the amount upon which the return should be computed, it is clear from the review of the facts hereinbefore contained that this sum is absolutely out of line, and that we can not consider the price of 75 cents as a factor which should substantially influence our judgment. If the Company, with its eyes open or not, from motives of policy, chose to accept that sum, it had the undoubted right so to do and pocket the return which it gave. We are not at liberty to act upon such considerations in fixing the price as is the Company. It can, if it so desire, make a rate which will afford less than a 6 per cent return upon the fair value of the property in service. It would seem that we can not so do.

COST OF OPERATION

The Company has submitted evidence showing the amount of gas sold by it each year, beginning with the year ended September 30, 1907, and ending with the year ended December 30, 1910; and also showing the cost of operation and taxes paid during the same period. Operating costs have not been particularly questioned by the City except in one particular presently to be adverted to, and the average cost including taxes for the period covered appears by such evidence to have been 58.55 cents per thousand cubic feet. Full analysis has been made of the cost of each step in the process of manufacture and distribution and it does not appear that these operating costs are open to serious criticism in any detail. On some matters there is perhaps an opportunity for discussion but the amount in such cases is too small to engage detailed attention. As the plant is and must be operated there will necessarily be an operating cost including taxes of from 55 to 59 cents per thousand cubic feet, fluctuating from year to year and not capable of being exactly predetermined for any considerable time. Taxes alone to the amount of over 10 cents per thousand cubic feet enter into this operating expense, and just what they will be in the future is not for this Commission to guess. It is use-

less to attempt to conjecture more closely than this the operating cost per thousand feet.

UNACCOUNTED FOR GAS

The serious criticism made by the City upon the operating expenses is that the amount of unaccounted for gas is excessive. The percentage of the total amount of gas manufactured in 1910 which was unaccounted for was 14.37. This translated into terms of cost added in that year 3.94 cents to the cost of each thousand cubic feet of gas sold.

On the other hand, the Company claims that the amount of unaccounted for gas was not abnormally large under all the circumstances of the case and did not show that the condition of its mains was such as to permit of a waste and leakage beyond that allowable in good practice.

The controversy between the parties lies largely in the difference in methods used in interpreting conceded facts. The City shows by the statistics of other companies that 14 per cent unaccounted for is excessive. The Company's answer is that a percentage test is wholly delusive; that so far as unaccounted for gas depends upon leakage which is concededly the chief cause, that would be the same whether a large or small amount of gas is transported through the mains; that if in the year 1910 it had sold only one-half the amount which it did sell, or double that amount, the leakage would have been the same in either case while the percentage would have varied with the amount; that the amount which it was able to sell owing to natural gas competition was abnormally small per mile of main, and this of course produced a large percentage of loss when compared with other cities selling from two to four times as much gas per mile of main.

It will serve no useful purpose to review all the evidence and arguments upon this matter. In general, we think the Company has sustained its contention that there is but little in the matter of unaccounted for gas which should influence our determination as to the rate.

THE CITY'S COKE OVEN THEORY

The corporation counsel in his brief uses the following language:

So far as the actual operation of the plant that exists in Buffalo and so far as the proof in this proceeding shows, I am inclined to believe that the position taken by the Gas company is tenable: that is, the City is not prepared to say that it does not cost the Buffalo company to put gas in the holder the sum per thousand cubic feet as shown by it, but the City does say and most emphatically, that it is not necessary for the Buffalo company to have it cost that figure.

The justification offered for this statement is the evidence of the witness Forrest regarding the operations of the Citizens Gas Company of Indianapolis. The Commission has found itself unable to adopt the theory of the learned corporation counsel, and believes that the cost of operation allowed in this case must be the actual cost with the plant constructed and operated as it is. It is true that the plant is constructed and operated in accordance with universal practice where the production and sale of manufactured gas is the main intent and purpose of the business. The generating plant is in reasonable condition, is operated efficiently and in accordance with approved practice. Now it is claimed that if instead of being the principal product gas is made a byproduct and coke the chief product, the gas can be made and put into the holder *for nothing*, and the entire expense now involved in manufacture can be eliminated and therefore all such expense should be disallowed in this case. The whole point is that with coke as the chief product the gas can be manufactured and put in the holder for nothing.

Whether this be true depends upon the results attained in the coke business. It is claimed that such is the result in Indianapolis, but the evidence shows clearly as we understand it that whether such results could be attained in Buffalo would depend upon a number of factors which are more or less uncertain. In other words, the coke business like all others has its risks and uncertainties. It would serve no good purpose to speculate as to the precise results

which could be made to flow from the building of a coke oven in Buffalo. The evidence of the witness who had considered and figured upon the proposition discloses just what is said above: namely, that what would happen in a financial way depends upon factors relating to the coke business and not to the gas business if gas is to be put into the holder for nothing.

If the coke oven theory is to be adopted by the Commission, the power of the Commission extends to forcing the Company to go into the coke business as its principal business, using the gas derived therefrom as a byproduct only. New and improved processes of manufacture may, under proper circumstances, be insisted upon by the Commission, but such is not this case. It is not a new and cheaper process of manufacture which is demanded, but entrance upon a new business with its attendant investment and risks. It is upon this point that we part company with the views of the learned corporation counsel. He cites no authority in support of his views, and knowing his diligence we must assume there is none. The matter seems to be wholly open to reason, and in this we feel that it is beyond the province of this Commission to put the Buffalo Gas Company into bankruptcy if it will not or can not go into the coke business. It makes and sells coke now, it is true, but that and the residuals are only byproducts incidental to its main business of manufacturing gas. They reduce the expense of manufacturing gas very greatly and the public gets the benefit. The whole theory of the matter is changed by the view presented to us, and with such change we are unable to agree.

GENERAL CONCLUSIONS

We have now discussed in detail most of the principal matters in controversy and the results of that discussion may be briefly summarized:

1. We have no data before us from which we can accurately determine the original cost of the complainant's property used in the public service.

2. We can not determine from the evidence with reasonable accuracy the cost of reproduction new of that property.

3. There is no means of ascertaining the actual present condition of the street mains which constitute the larger part of such property if such present condition is material in determining what if any depreciation should be deducted from the cost of reproduction new.

4. There is no evidence sufficient to establish the probable life of the street mains; nor is there any evidence justifying a finding as to how long the mains now in the ground have been laid.

It is clear some of them have been laid a long time; that most of them were laid before 1897; that their present condition depends largely upon the character of the soil in which they are laid which is shown to vary materially in different localities; that pipe laid in comparatively recent years is in some cases not in as good condition as other pipe that was laid many years previously.

If the cost of reproduction new were to be taken as the basis upon which the rate is to be computed, we would likely be compelled to deduct therefrom the accrued depreciation in obedience to the rule laid down by the United States Supreme Court in *Knoxville vs. Knoxville Water Company* (212 U. S. 1.), whether we considered that rule economically sound or otherwise. The uncertainties in this case as to original cost and cost of reproduction new, as well as to the actual condition of the physical property, make a discussion of the proper handling of depreciation in a rate case entirely academic. It is clear that the treatment of depreciation in any given case depends upon facts which are not clear in this case, and to lay down principles which can not be applied would serve no useful end. Our views on this important question which was much discussed during the hearings will be more appropriate in other cases before us in which the facts are more clearly ascertainable.

We have considered all the obtainable facts with reference to original cost, cost of reproduction new of the prop-

erty used in the public service, the probable earning power of the plant under particular rates, the amount and market value of the stocks and bonds outstanding, the amount of the reasonable investment required to produce the service afforded by the Company, the history of the Company and its rates and returns in the past, the difference in the rate which it may be claimed should obtain between the City as a very large consumer and the general consumers whose individual consumption is comparatively small, the rate heretofore voluntarily accorded by the Company to the City — in short, every element which could reasonably be weighed in determining what is a just and reasonable rate to the municipality, and our judgment based upon the entire situation is that 90 cents per thousand cubic feet furnished the City will afford a just and reasonable return to the Company upon the fair value of its property in the public service so far as that branch of the business is concerned. If there should be a smaller rate to the City than to the private consumer, the difference would necessarily appear in the rate of return and not in the rate base or fair value.

This conclusion, it must be clearly understood, is a judgment upon the whole situation; and while figures may be given showing, for instance, how cost of reproduction new less depreciation would work, such figures must not be construed as definite findings. We adhere to the conclusions as to details hereinbefore stated.

Thus we may assume the structural cost of the mains substantially as claimed by the Company, add thereto a percentage for engineering and interest during construction, and deduct from the aggregate a not unreasonable percentage for depreciation, as follows:

Structural cost as per table given	\$1,499,822
Pavement actually laid	174,900
Rock excavation claimed	111,539
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Total structural cost	\$1,786,259
Eng. and int. during construction, 10 per cent.	178,625
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Total	\$1,964,884
Less 30 per cent depreciation	589,465
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Reproduction cost, less depreciation	\$1,375,419

Assembling these figures with those heretofore suggested for other matters, we obtain the following table:

Item	Structural cost	Per cent	Amt. of per cent	Total cost	Per cent of dep.	Amt. of dep.	Dep. value
Land.....	\$259,054	6	\$15,543	\$274,597	.....	.....	\$274,597
Buildings.....	204,132	10	20,413	224,545	.....	\$22,233	202,312
Mfg. app.....	265,000	10	26,500	291,500	25	72,875	218,625
Holders.....	307,700	10	30,770	338,470	25	84,617	253,853
Mains.....	1,786,259	10	178,625	1,964,884	30	589,465	1,375,419
Services.....	133,215	10	13,321	146,536	20	29,307	117,229
Curb-cocks, etc.....	22,822	10	2,282	25,104	10	2,510	22,594
Meters.....	145,920	10	14,592	160,512	20	32,102	128,410
Office fur.....	7,300	.....	.....	7,300	.....	.....	7,300
Stable eqpt.....	13,499	.....	.....	13,499	.....	.....	13,499
Tools and imp.....	10,042	.....	.....	10,042	.....	.....	10,042
	\$3,154,893	.....	.....	\$3,456,989	.....	.....	\$2,623,870

Second column shows per cent assumed for interest during construction and engineering. Depreciation on buildings is that given by Company's witness Byers.

Adding practically 5 per cent to cover contingencies would bring the amount for the plant of the Company up to \$2,750,000; reproduce service Peoples plant \$150,000: total investment \$2,900,000.

At 6 per cent, this amount would produce a return of \$174,000. The sales in 1910 were 633,000 thousand cubic feet, and a rate of 27.5 cents on this number of thousand cubic feet would yield substantially this return. In addition to this there must be an allowance in the rate to cover depreciation. Assuming the depreciable property to amount to \$2,500,000, and the average life of the whole to be 35 years, an allowance of 5.3 cents per thousand would be required. The 90 cents would then be made up as follows:

Operating expense per M cu. ft.....	\$0.572
Return on capital.....	0.275
Depreciation.....	0.053
Total.....	\$0.900

On the whole, this has been an exceedingly unsatisfactory case with which to deal, involving as it does so many elements of doubt and uncertainty. We are, however, unable to satisfy ourselves that a less rate than 90 cents would do substantial justice, and that amount will accordingly be used in the order to be issued.

CONCURRING

SAGUE, *Commissioner*:

I concur in the foregoing decision, that under all the conditions of this case, and as a matter of business judgment, 90 cents is a fair rate for the gas to be furnished to the City; and believe that this rate should be accepted by both parties, without question.

It should however be clearly understood that the figures given in the illustration included under General Conclusions in the last portion of the report are intended only to show that 90 cents is the minimum rate which can be fairly fixed under any view of the case. It is my opinion that a value for rate making purposes considerably above the figures stated in the illustration has been proved. It is also clear to me that 6 per cent is a lower rate of return than the Commission can justly assume as fair to the Company under the competitive conditions which exist in Buffalo and with the consequent business risk involved.

IN the Matter of the Complaint of LOUIS P. FUHRMANN AS
MAYOR OF THE CITY OF BUFFALO *against* THE CATARACT
POWER AND CONDUIT COMPANY.

The Cataract Power and Conduit Company sells electric energy in the city of Buffalo. It purchases this energy from The Niagara Falls Power Company, the price paid being \$16 each electric horsepower delivered at the northerly line of the city. The mayor of the City made complaint that the prices charged by said company were unjust and unreasonable. After answer and hearing, the prices charged, with the exception of that for energy sold to the International Railway Company, are reduced 28 per cent without change in form of the sliding scales used by the company in its schedules.

The opinion contains discussions of the following subjects:

(a) Has the contract of the respondent with The Niagara Falls Power Company for the purchase of electric energy at \$16 per horsepower, a property or capitalizable value upon which it is entitled to a return?

(b) Fair value of property used in the public service: what it is and how arrived at.

(c) "Going concern" value: whether it is a property right entitled to such a return.

(d) Depreciation.

(e) Amortization of the depreciable property of the company, its franchise terminating in twenty years.

Decided April 2, 1913.

Clark H. Hammond, Corporation Counsel, *Harry D. Sanders*, Assistant City Attorney, for complainant.

Kenefick, Cooke, Mitchell & Bass for respondent.

STEVENS, *Chairman*:

The Cataract Power and Conduit Company was incorporated the 18th day of June, 1896, pursuant to the provisions of the Transportation Corporations Law. Shortly thereafter it commenced the construction of its plant in the

city of Buffalo for the distribution of electric energy, chiefly for power purposes and incidentally and to a small extent for lighting purposes. It has been engaged in that business from about 1897 down to the present time. The City of Buffalo through its mayor makes complaint that the rates charged by this company for electric energy are unreasonable and unjust, and asks that such rates be fixed at a reasonable and just amount. The company denies that its present rates are unreasonable or unjust. Upon the issues joined by the complaint and answer, hearings have been had and evidence has been submitted by both parties, and the case has been submitted upon voluminous briefs.

The importance of the controversy and its magnitude demand a careful study of the history of the company and its operations. No proper disposition of the case can be made without a full understanding of the manner in which the company was organized and its subsequent financial operations.

On the 2nd day of December, 1895, the common council of the City of Buffalo adopted an ordinance which was approved by the mayor on the 16th day of December, in and by which there was granted to The Niagara Falls Power Company the right to erect poles, string wires and cables, and to lay conduits in the streets of the city of Buffalo for the purpose of transmitting electricity. This grant was accepted by The Niagara Falls Power Company on the 14th day of January, 1896, and on the same day a written acceptance was filed with the city clerk of the City of Buffalo, and thereupon the said franchise became effective. On the 1st day of July, 1896, The Niagara Falls Power Company assigned the said grant to The Cataract Power and Conduit Company.

On the 1st day of June, 1896, The Niagara Falls Power Company entered into an agreement with Franklin D. Locke in and by which it agreed to deliver to the said Locke a stipulated amount of electric horsepower at a price named

in the agreement, the delivery of such electric horsepower to be made at the northerly line of the city of Buffalo. At a meeting of the board of directors of The Cataract Power and Conduit Company held on the 1st day of July, 1896, the company accepted from said Locke an assignment of the said agreement with The Niagara Falls Power Company, and also an assignment from said The Niagara Falls Power Company of its license to occupy state canal lands for a transmission line within the city of Buffalo. In consideration of the assignment by The Niagara Falls Power Company of the franchise from the City of Buffalo and the license from the State, and of the assignment by Locke of the contract with The Niagara Falls Power Company, The Cataract Power and Conduit Company issued to them the full authorized amount of its capital stock, namely 20,000 shares of the par value of \$2,000,000. Of this amount there were issued to The Niagara Falls Power Company 10,050 shares of the par value of \$1,005,000, and to Locke 9950 shares of the par value of \$995,000. In this transaction Locke appears to have been acting for individuals other than himself, and accordingly the stock was not issued directly to him but apparently to persons for whom he was the representative. It is unnecessary at this time to go into the transaction in further detail. The point to the whole matter is, that none of the stock of the Cataract company was issued for cash and that the sole consideration for its issue was as above stated.

Upon the hearings, both the oral and the documentary evidence of the City and the respondent were chiefly directed to the question of the reproduction cost new of the physical property of the company. The respondent gave some evidence tending to show the commercial value, as it terms it, of its property. It was of course impossible for the City to give any direct evidence as to the actual cost of the property, or in other words the cash investment made by the company in its plant. After the case had proceeded

to such a point that it was clear the respondent did not intend to pursue the inquiry in that direction, the Commission on its own motion ordered an investigation to be made by its examiners into such actual cost as shown upon the books of the company. An exhaustive examination was made of the books and vouchers of the company during the period of its existence. A voluminous report was made thereon to the Commission, copies of which were furnished to both the City and the respondent; and after some period was allowed for examination of the same, the report was introduced in evidence as a part of the record in the case. The City has chosen to make no comments thereon. The respondent has made such comments thereon as it deemed proper.

Substantially, there is no criticism upon the examiner's report as to the cash investment in the physical property of the company except upon one point which will be discussed later.

The following is a summary of the fixed capital owned by the respondent and in service December 31, 1911, as shown in the examiner's report:

<i>Accounts</i>	<i>Amounts</i>
Real estate	\$54,601.45
General structures	6,630.36
Buildings	127,026.82
Sub-station buildings	1,490.84
Station equipment	487,076.98
Sub-station equipment	140,630.43
Transmission line	46,592.24
Cable	448,848.53
Transmission system	58,897.09
Distribution system, other underground.....	17,076.15
Conduit	120,573.38
Canadian conduit	2,766.54
Manholes	26,809.96
Underground conduit	21,994.66
Overhead construction	65,535.81
Electric services	8,131.23
Distribution system, overhead	45,418.85
Poles and fixtures.....	13,923.71
Transmission tower	21,019.13
Niagara River span	16,927.60
Transformers	5,409.44

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<i>Accounts</i>	<i>Amounts</i>		
Line transformers and devices.....			\$13,464.69
Meters			29,266.93
Electric meters			15,951.06
Electric meter installation			1,177.09
Electric instruments			619.18
Electric tools and implements.....			660.62
Electrical laboratory equipment.....			1,792.97
Office furniture and fixtures			629.22
General equipment			13,360.14
General construction			20,762.83
Preliminary expenses			28,810.25
<i>Deficit during construction:</i>			
Balance June 30, 1899.....	\$36,411.95		
Expenses applicable to period of construction, charged to profit and loss in subsequent period			
1898	\$72.75		
1899	5,565.89	5,628.64	42,040.59
Total			\$1,905,916.76

In connection with the foregoing summary, it is proper to observe that the examiner's report gives full detail of quantities and prices used in reaching the foregoing summaries of the several ledger accounts, the property on hand being taken to be that enumerated in the inventory introduced in evidence by the respondent.

It is important to observe at what amount the fixed capital of the company is carried upon its books. In its annual report to this Commission for the year ended December 31, 1911, following the classification required by the Uniform System of Accounts for Electrical Corporations prescribed by this Commission, the company states that its fixed capital on the 31st day of December, 1908, was \$3,416,251.93; and that the fixed capital installed by it since December 31, 1908, down to December 31, 1911, amounts to \$360,599.88: thus making a total fixed capital of \$3,776,851.81.

Its analysis of its fixed capital December 31, 1908, given in the same report, is as follows:

Real estate	\$54,601.46
Buildings	120,541.73
Station equipment	489,247.86
Cable	448,848.53
Conduit	135,047.26

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Manholes	\$26,809.50
Transmission line	46,592.20
Transmission tower	21,019.13
Niagara River crossing.....	16,927.60
Overhead construction	72,286.45
Canadian conduit	2,786.54
Transformers on line.....	6,390.87
Meters	34,928.96
Electrical instruments	619.18
Office furniture and fixtures.....	629.22
General construction	18,210.21
Preliminary expenses	28,810.25
	<hr/>
	\$1,522,276.93
Less, to equalise the investment of Amortisation account at January 1, 1909, with the Accrued Amortisation of Capital at that date.....	<hr/> 106,025.00
	<hr/>
	\$1,416,251.93
Contracts, licenses, etc.....	2,000,000.00
	<hr/>
	\$3,416,251.93

It will be seen from the foregoing that on the 31st day of December, 1908, its books showed the actual cost of its fixed capital to be the sum of \$1,522,276.93, and that the sum of \$106,025 deducted therefrom was merely an accounting entry designed to transfer a part of the fixed capital to the account Accrued Amortization of Capital. It will be further noted that the sum of \$2,000,000, which is the amount of its capital stock, is frankly set forth as the cost of "Contracts, licenses, etc.," referring thereby clearly and unmistakably to the consideration hereinbefore detailed for the issue of the capital stock.

By restoring the sum of \$106,025 to Fixed Capital account, it will be seen that the company was, December 31, 1911 (the point agreed upon in this case from which all matters should date), carrying its fixed capital on its books at a cost of \$1,882,876.81, while the examiner reports the total of such actual cost as \$1,905,916.76, an excess in the amount reported by the examiner over that appearing upon the company's books of \$23,039.95. This difference arises from the fact that the examiner deducted from the accounts of the company as improper charges to fixed capital the sum of \$19,000.64, and added thereto the sum of \$42,040.59,

being practically the amount of deficit during construction which had occurred up to the 30th day of June, 1899. Whether or not this deduction and addition made by the examiner were warranted is a matter of but very little consequence, since the discrepancy in the totals shown by the books of the company and the report of the examiner is too small to affect in any substantial way the decision of this case.

It may be fairly assumed that the cost of the physical property of the company was, exclusive of matters to be hereinafter discussed, the sum reported by the examiner, namely \$1,905,916.76.

This fixed capital does not represent the entire tangible property used by the respondent in the public service. It appears undisputedly in the evidence, that on December 31, 1911, it had in process certain construction not yet completed upon which there had been expended \$106,181.68, and these book orders in process, as they may be termed, are a part of the property of respondent in the service of the public upon which it is entitled to a return. On the same day it also had on hand materials and supplies of an appraised value of \$40,180.08. These are also a part of its property to be considered in this case. In addition to the foregoing, it has a certain amount of working capital upon which it should be allowed a return, the amount of which however is in dispute and will require further discussion.

The sum of the foregoing matters, exclusive of working capital, is as follows:

Cost of fixed capital.....	\$1,905,916.76
Book orders in process.....	106,181.68
Materials and supplies.....	40,180.08
Total	\$2,052,278.52

In order to ascertain precisely what matters are in controversy in this case, it is proper next to state the claim made by the company as to the value of its property used in the public service upon which it is entitled to a return. It

fixes this amount in several ways. So far as the tangible property is concerned, it calls attention to three results, as they may be termed, from which such value may be determined: namely, the commercial value to be determined by the market value of its stock and bonds; the net earnings value arrived at by capitalizing its net earnings for a given year; and its reproduction value new, plus going concern value and the claimed value of its contract for the supply of energy with The Niagara Falls Power Company.

Confining our attention to the reproduction value theory, we find it is claimed to be as follows:

Cost of reproducing physical property new	\$3,504,008
Value of contract with The Niagara Falls Power Co.	2,000,000
Going value	300,000
Other items	184,905
Total value	\$5,988,918

It is difficult to reproduce in detail the claim made by the City as to the value of respondent's property in service, nor indeed is it essential so to do at this time. As we understand it, such amount is something under \$2,000,000.

Without going further into detail, it will be seen that there is practically a difference of \$4,000,000 involved in the controversy as to the value of the property in service, and this with no substantial dispute as to what the property is. Before entering into an inquiry as to what constitutes such a tremendous difference in estimates of value, attention should be called to the general financial condition of the company. The following is its condensed balance sheet as of December 31, 1911, taken from its annual report to this Commission for that year:

<i>Assets side:</i>		
Fixed capital December 31, 1908.....	\$3,416,251.93	
Fixed capital installed since December 31, 1908.	360,599.88	
		\$3,776,851.81
Current assets:		
Cash	\$355,543.31	
Accounts receivable system corporations.....	91.84	
Other accounts receivable.....	219,508.96	
Interest and dividends receivable.....	2,005.25	
		577,148.86

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Materials and supplies.....		\$40,180.08
Miscellaneous investments:		
Free investments	\$840.00	
Other investments	210,000.00	
		210,840.00
Miscellaneous temporary debits:		
Special deposits	\$64,875.00	
Prepayments	7,025.12	
Other suspense (work in process).....	109,346.89	
		181,247.01
Total		\$4,786,267.16
<i>Liabilities side:</i>		
Stock		\$2,000,000.00
Funded debt, mortgage bonds.....		1,384,000.00
Unfunded debt:		
Taxes accrued	\$42,020.08	
Interest accrued on funded debt.....	84,875.00	
Dividends declared	80,000.00	
Consumers' deposits	650.00	
Owing system corporations.....	8,333.33	
Accounts payable	52,760.54	
		168,638.95
Reserves:		
Accrued amortisation of capital.....		496,499.16
Corporate surplus		747,129.65
Total		\$4,786,267.76

The examiner in his report rearranges this balance sheet to a material extent, but it is not necessary to insert the rearranged balance sheet at this point. Later on it may become essential to an understanding of some of the questions involved.

The material points to which attention should be called as shown by the foregoing balance sheet are as follows:

First, the funded indebtedness is shown to be \$1,384,000, being the amount of its bonds outstanding. The report of the company to the Commission states that the cash actually realized for these bonds was \$1,376,150, showing that they were disposed of at almost par. Thus we find that the existing property of the company was constructed from the proceeds of these bonds and from earnings from operation, no cash or property whatsoever having been obtained by the issue of stock except as hereinbefore detailed. We also observe that the corporate surplus is \$747,129.65.

*Value of the Contract for Power with The Niagara Falls
Power Company*

As above shown, the respondent is the owner of the contract of June 1, 1896, between Franklin D. Locke and The Niagara Falls Power Company. This contract has been supplemented by various subsequent contracts modifying or qualifying to some extent the provisions of the original contract. It is unnecessary to set forth all the details of any of these contracts. It will be sufficient to accept for the purposes of the discussion the statement made by respondent its own words, contained in the brief of its counsel:

Under these contracts, therefore, The Niagara Falls Power Company is required to furnish to the Cataract company at its stations in Buffalo for over a thousand years at least 37,500 horsepower at the rate of \$16 per horsepower per annum.

It will be best to state the contention of the company regarding the value of this contract and its supplements in its own words, contained in the brief of its counsel:

The only questions fairly to be considered are: (a) Has the contract any value? (b) If so, what is the proper method of arriving at its value? and (c) should that value or any part thereof be included in the fair value of the entire property of the company as a basis for rate making purposes?

With the evidence undisputed in the record that there is a demand on the part of the consumers at Niagara Falls for power at \$20 per horsepower per annum; that the cost of transmitting power to the Buffalo city line is approximately \$4 per horsepower per annum, making a total cost here of \$24 per horsepower per annum, assuming that there were any Falls power available, which is not the fact; with the undisputed testimony in the record that the cost of generating electric power in Buffalo with the most modern steam plant would range from \$25 to \$28 per horsepower per annum, can it reasonably be questioned that this contract, requiring the delivery of 37,500 horsepower at the city line every year during the term of the Cataract's franchise (nineteen years yet to run) and beyond for upward of a thousand years at the rate of \$16 per horsepower has a value? Clearly not. How then should such value be arrived at?

Assuming the market value of hydro-electric power at the Falls at \$20 per horsepower per annum, and assuming \$4 per horsepower per

annum as the cost of transmission to the Buffalo city line, we have \$24 per horsepower per annum as the market value of Falls power at the Buffalo city line, assuming there were any available.

Applying the other test as to the cost of generating electric power by a modern steam plant in Buffalo, we have \$25 to \$28 per horsepower as the lowest estimate for the cost of steam generation. It is apparent, therefore, that the only logical way of arriving at the value of this contract is by taking the difference between the cost of power under the contract and the cost of power generated here by steam. The difference is \$9 per horsepower per annum. Multiply this by the 37,500 horsepower which the power company is required to deliver us, and we get the annual saving of \$337,500 per annum. This sum capitalized at 8 per cent would be over \$4,000,000.

An analysis of the foregoing excerpt from the respondent's brief shows that the facts upon which the company relies to sustain its contention that this contract is of value to it to the extent of \$2,000,000 and upward are as follows:

1. That under the terms of the Locke contract it has a right to have The Niagara Falls Power Company deliver to it in practical perpetuity at the city line of Buffalo each year not less than 37,500 electric horsepower;

2. That it is required to pay for each horsepower delivered to it as aforesaid only the sum of \$16 per annum;

3. That there is no other hydro-electric power available to be delivered in Buffalo at the present time and no prospect that there will be any other in the future: that by reason of this fact it has a practical monopoly of hydro-electric power in that city;

4. That the minimum cost of steam generated electric power in Buffalo at the switchboard is \$25 per horsepower per annum;

5. That the company can sell this power at \$25 in competition with steam generated power, and hence in so selling it there is a clear profit of \$9 per horsepower;

6. That this profit of \$9 per horsepower computed upon the total amount to which it is entitled, 37,500 horsepower, gives an annual profit of \$337,500;

7. That \$337,500 annual profit capitalized at 8 per cent amounts to \$4,218,750.

It is clear from the foregoing analysis that the alleged value of the contract depends upon whether the company has a vested right to sell its electric energy at switchboard cost of steam generated electric energy plus the cost of distribution, with proper returns upon the capital invested in such distribution. If the company has such a vested right, there is no escape from the argument presented by it. If it has not such a vested right, the argument falls at once.

If this Commission has the right to reduce the selling price to be charged by the company below the assumed cost of steam developed electric energy, to the extent that it so reduces such price, it deprives the contract of its alleged value. If it should reduce the price so as to cut the profit of \$9 in half, it would deprive the contract of one-half of its assumed value. If it should treat the \$16 per horsepower paid by the company for energy as an operating expense merely, in such case the contract would lose all its alleged value.

Stating the matter in another way, the value of the contract depends upon the price which the company is entitled to receive for the energy which it produces. If it is entitled as a matter of absolute right to receive \$25 per horsepower for that energy, then it is entitled to a clear profit of \$9 per horsepower, and the contract is a property right of great value. If, on the other hand, the company is not entitled as a matter of legal right to charge \$25 per horsepower for this energy, but can be required to sell it at a less sum, the supposed value of the contract disappears proportionately as the price is reduced.

It is clear that the selling price fixes the value of the contract. If the selling price were \$30 per horsepower, the contract, upon the line of reasoning adopted by the company, would be of much greater value than \$4,000,000. If the selling price is \$16 per horsepower, then the contract has no particular value except as it insures to the company a supply of energy at all times.

The whole matter, therefore, depends upon the question whether the company has a vested right to sell its electric energy at the cost of steam generated energy at the switch-board. If it has such a right, obviously the Commission can not interfere with it. The company has offered no argument whatsoever in support of this proposition. It has merely assumed such a right without even stating it in words.

By reducing the value of this contract for the purposes of this case to \$2,000,000, it has wholly surrendered the contention that the Commission can not reduce the price, or in other words, interfere with the return upon the claimed property value of the contract.

It is a conceded fact that Niagara generated power is cheaper than steam generated power. There is a great saving; and the question is, who gets the benefit from the saving? This question was propounded directly to the principal witness for the respondent, and his answer was —

My conclusion is that it is fair to all parties to divide the advantages of hydraulic generated electric power between the public and the people whose enterprise makes the utility of the hydraulic power by this process.

This conclusion seems to be concurred in by the respondent; and therefore, instead of insisting upon a return upon the sum of \$4,000,000 and upward, which is logically, upon its contention, the value of the contract, it contents itself with placing the value of the contract at \$2,000,000. When it concedes that there should be any reduction in the selling price because it is fair and reasonable, it yields the point that it has a vested right to the entire difference in cost. It concedes that what is fair and reasonable is the principle by which the selling price must be determined, and not because it has any property right to the difference. It concedes that under all of the circumstances of the case, it is fair and reasonable that the saving, as it terms it, should be divided between the public and itself. This opens the

question at once, what tribunal is to determine what is fair and reasonable? Is the company itself to determine it, or is it the Commission? If the Commission says that the fair and reasonable proposition is that the profit should be divided between the public and the company, then the company has succeeded in its contention: but not upon the ground of a vested property right. If the Commission says that the public should be entitled to the entire difference, or that the public should be entitled to three-fourths of the so called saving and the company to one-fourth, the property value of the contract disappears in whole or in part, and the Commission has not confiscated any property but has merely determined what is fair and reasonable under all of the circumstances of the case. This line of reasoning leads directly to the conclusion that the value of the contract is dependent upon the determination of the Commission, and not that the value of the contract is independent of the determination of the Commission and superior to it.

The position of the company also is not defensible, for the reason that it does not go back to the generating plant, namely that of The Niagara Falls Power Company at the Falls. Let it be assumed that The Niagara Falls Power Company can produce electric energy at its busbars at a cost of \$7 per horsepower, and that the cost of electric energy developed by steam at the same point would be \$25 per horsepower. Upon such assumption, there is a clear profit upon the 37,500 horsepower secured in the contract of \$18 per horsepower, or \$675,000 per annum. If this profit or saving is to be divided with the public, then the public is entitled to get the electric energy at the busbars at \$16 per horsepower, and the profit to the company from the use of the water power is \$9. The respondent, however, is willing to divide with the public only the difference between \$16 and \$25, namely \$9; so that in effect the public gets only one-fourth of the saving effected by the use of water instead of one-half. Its equity in one-half of the saving is

cut down to one-fourth by the device of a subsidiary company.

This reduction in the share accruing to the public, or as it may be termed, in the saving, may be carried still further. If the Cataract company is entitled to a profit of \$4.50 upon the energy which it sells, it is entitled to that profit upon all energy sold to the Buffalo General Electric Company. The Buffalo General Electric Company, in its purchase from the Cataract company, gets a right upon the theory of respondent to some of the advantages of the water power, and it is as much entitled to one-half of the profits as the Cataract company; hence it would be entitled to take out \$2.25 per horsepower for its advantage, and the public would then get only \$2.25 for its share, or one-eighth of the saving. Upon the assumption of division of the saving, if the public deals directly with The Niagara Falls Power Company it is entitled to get the energy at \$16 per horsepower, just what the Cataract company pays. By the intervention of the Cataract company it is required to pay \$20.50, and by the further intervention of the Buffalo General Electric it is required to pay \$22.75.

Such results as these will never satisfy the elementary sense of right and justice in the mind of any man with regard to the use of Niagara generated electric energy. No generating company using the waters of Niagara river owns those waters or has any right or title to them whatsoever. By the permission of the Federal Government and of the State of New York, the generating companies operating at the Falls are given the free use of those waters in the production of electric energy. To say that by having been given the free use of those waters for that purpose they are vested with an unassailable right to charge as much for the electric energy developed as they would for energy developed by steam plant, is a proposition which requires to be maintained rather than to be refuted. It may very well be that these companies are entitled, in view of all of the circumstances of the case, to a liberal return upon the capital actually

invested in developing the energy. It may very well be that the people exploiting the enterprise are entitled to large, and even very large, profits for the skill they have displayed and the risk to which they have subjected their capital. It may be that the public ought to pay them very liberally for the work which they have carried on in the public interest; but to say that the public is entitled to no advantage from the use of these waters, that the territory which can be served with electric energy developed at Niagara Falls has no advantage and is entitled to no benefit by reason of proximity to those Falls, is to say something which does not appeal to the best judgment of mankind for an instant.

We may therefore dismiss without further consideration the claim of the company that its contract with The Niagara Falls Power Company has a value of \$2,000,000 upon which it is entitled as a matter of right to a return of not less than 6 per cent per annum; and the question of what return it is entitled to, if any, in excess of the cost of steam generated electric energy, is one which may be considered in another connection.

Reproduction Cost New of Fixed Capital

The great bulk of the evidence was directed, both upon the part of the City and the respondent, to the endeavor to establish the cost of reproducing new the fixed capital of the company. The following table is an analysis of the evidence submitted by both parties as to the cost of such reproduction new of the entire tangible property of the company:

Item	Company (Jackson)	City	Difference	Excess of larger estimate over smaller, %
Labor and materials costs:				
Land	\$102,655	\$61,162	\$41,493	68
General structures	20,733	19,579	1,154	6
General equipment	12,681	6,263	6,418	102
Sub-station buildings	116,935	141,551	24,616	21
Sub-station equipment	784,604	627,586	107,018	17
Poles and fixtures	21,857	26,555	4,698	21
Terminal "B" tower	23,006	14,418	8,588	60

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Item	Company (Jackson)	City	Difference	Excess of larger estimate over smaller, %
Ducts:				
Underground conduit and laterals.....	\$239,732			
Pipe crossing, Buffalo river.	12,769			
	\$252,501	\$263,976	\$11,475	5
Overhead wire:				
Transmission system.....	\$11,809			
Distribution system.....	105,868			
Electric services.....	15,572			
	132,749	114,904	17,845	16
Underground cable:				
Transmission system.....	\$579,425			
Distribution system.....	34,651			
Electric services.....	2,222			
	616,298	442,727	173,571	39
Transmission system, Niagara River crossing.....	16,918	3,364	13,554	402
Line transformers.....	22,382	17,725	4,657	26
Electric meters.....	40,401	37,006	3,335	
Tools and implements.....	434		434	
Electrical laboratory equipment.....	3,609	3,551	58	2
Total fixed capital.....	\$2,117,763	\$1,780,427	\$337,336	19
Materials and supplies.....	25,694		25,694	
Meters and transformers in stock.....	12,451		12,451	
Operating capital.....	175,000	96,103	78,897	83
Work in progress.....	109,347	109,347		
Total labor and materials costs.....	\$2,440,255	\$1,985,877	\$454,378	23
Various overhead percentages.....	1,063,753		1,063,753	
Final grand total.....	\$3,504,008	\$1,985,877	\$1,518,131	76

It will be noted that the total cost of labor and materials entering into the fixed capital as claimed by the company is \$2,117,763; and as claimed by the City, \$1,780,427. The difference between the two is \$337,336, an excess of the company's claim over that of the City of 19 per cent.

It will be further noted that the company adds to its labor and materials costs various overhead percentages amounting to \$1,063,753. It is understood that while the City admits that certain overhead charges in the way of engineering, superintendence, interest during construction, and the like must be reckoned with in the cost of reproduction new, it claims that it has made due allowance for the same in the labor and materials costs, and that therefore such costs as set forth in the table represent fair reproduction cost new of the property.

The final totals of the reproduction cost new of the tangible property of the company are \$3,504,008; of the City, \$1,985,877: a difference of \$1,518,131; an excess of the company's estimate over that of the City of 76 per cent.

The following table is an analysis of the claim of the company concerning the reproduction cost of that portion of its property represented by fixed capital. This table shows the labor and materials cost of the various items, the percentages which should be added to the various costs, and the sum of all the labor and materials costs and percentages. It will be observed that the total reproduction cost new of the fixed capital as claimed by the company is \$3,156,332.

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	Kind of plant	Labor and materials	Add for engineering and supervision, %	Making	Add for general incidents, %	Making	Add for insurance during construction, %	Making	Add for organization of the business, %	Making	Add for taxes and interest during construction, %	Tota
1	Land.....	\$102,655	5	\$107,788	...	\$107,788	...	\$107,788	6	\$114,255	12	\$127,966
2	General structures.....	20,733	10	22,806	...	22,806	...	22,806	6	24,278	8	26,220
3	General equipment.....	12,681	5	13,315	...	13,315	...	13,315	6	14,114	4	14,670
4	Sub-station buildings.....	116,935	10	128,629	...	128,629	...	128,629	6	136,933	8	147,888
5	Sub-station equipment.....	734,602	10	808,064	2	824,225	2	825,873	6	875,425	8	945,459
6	Poles and fixtures.....	21,857	10	24,043	2	24,524	8	24,720	6	26,203	8	28,299
6a	Terminal "B" tower.....	23,006	...	23,006	...	23,006	...	23,006	6	24,386	...	24,386
7	Underground conduit and laterals.....	238,732	10	266,705	1.5	267,661	...	267,661	6	283,721	8	306,419
7a	Pipe crossing, Buffalo river.....	12,769	5	13,407	...	13,407	...	13,407	6	14,211	8	15,348
8	Transmission system: (a) Overhead.....	11,309	10	12,440	2	12,689	8	12,791	6	13,558	8	14,643
	(b) Niagara River crossings.....	16,918	...	16,918	...	16,918	...	16,918	6	17,933	...	17,933
	(c) Underground.....	579,425	10	637,368	1	643,742	8	648,892	6	687,825	8	742,852
9	Distribution system: (a) Overhead.....	105,868	10	116,455	2	118,784	8	119,734	6	126,918	8	137,071
	(b) Underground.....	34,651	10	38,116	1	38,497	8	38,805	6	41,133	8	44,424
10	Line transformers and devices.....	22,382	10	24,620	2	25,112	8	25,313	6	26,832	8	28,079
11	Electric services: (a) Overhead.....	15,572	10	17,129	2	17,472	8	17,612	6	18,669	8	20,163
	(b) Underground (excluding conduit).....	2,222	10	2,444	1.5	2,481	8	2,501	6	2,651	8	2,803
12	Electric meters and installation.....	40,401	5	42,421	...	42,421	...	42,421	6	44,960	4	46,705
13	Electric tools and implements.....	34,434	5	36,456	...	36,456	...	36,456	6	38,483	4	40,502
14	Electrical laboratory equipment.....	3,809	10	3,970	2	4,049	2	4,057	6	4,300	8	4,644
	Total.....											\$2,697,503
	Add 10 per cent for piecemeal construction, items 2 to 12 inclusive.....											\$2,256,439
	Promoter's profit at 5 per cent.....											\$2,953,942
	Brokerage at 2 1/2 per cent on two-thirds of property.....											\$3,101,639
	Total.....											\$3,156,332

It will be instructive to compare in the first instance the estimates of the company as shown by the foregoing table with its books. An examination of the company's books disclosed, as hereinbefore shown, that the total cost of the fixed capital of the company as carried upon the books was \$1,882,876. As claimed by its principal witness upon the hearing, the cost of reproducing the property new was \$3,156,332, a difference of \$1,273,456, and an increase of 67 per cent over the amount carried upon the books.

It was suggested by the company that many of the expenses properly chargeable to fixed capital which were incurred in the construction of its plant might have been in the process of bookkeeping actually charged to operating expenses, and therefore that the books did not correctly reflect the actual cost of the property. No effort was made by the Commission's examiner to ascertain whether this suggestion was correct or otherwise. The company was advised that if the suggestion merited investigation, such investigation must devolve upon the company. It assumed that burden, and it is understood that for a considerable length of time it had an accountant upon the vouchers of the company for the purpose of ascertaining the fact. The examiner's report was submitted to the company for criticism and correction, and the firm of engineers upon which it relied as to the reproduction cost new of the property has furnished a statement showing the results of the examination as to whether any proper capital costs were included in operating expenses. Its examination seems to have covered a period from the organization of the company to December 31, 1900. The following is the material portion of the statement:

A corresponding allocation for the period from the organization to December 31, 1900, shows that the total labor and material aggregates \$555,428.69, of which \$13,575.37 is labor and material properly chargeable to capital, but which has been included in the vouchers as operating expenses. The total of capital overhead expenses for the period comes to \$103,510.20, of which \$56,610.54 has been vouchered as

operating expenses. These overhead expenses come to 18.6 per cent of the labor and material.

If it were important, the Commission would probably feel inclined to disagree with some of the allocations made in this paragraph. It is disposed, however, to examine the question of reproduction cost new in the light of the results claimed therein. Stating such results in tabular form, we obtain the following:

Total cost to December 31, 1900.....	\$555,428.69
Deduct overhead expenses	103,510.20
Cost of labor and materials.....	\$451,918.49
Percentage of overhead expenses	18.6

The evidence submitted by the company as to cost of reproduction new of fixed capital is as follows:

Total cost of labor and materials.....	\$2,117,763
Total overhead expense	1,038,569
Total cost	\$3,156,332
Percentage of overhead expense to labor and materials cost	49

If we apply the percentage of overhead expense obtained from the books, namely 18.6 per cent, to the estimate of labor and materials cost in the evidence, we obtain the following:

Labor and materials cost	\$2,117,763
Overhead expense (18.6%).....	393,903
Total cost	\$2,511,666

The difference between the total thus obtained and that claimed by the company is \$644,666.

We may obtain the total cost to the company in another way. In the foregoing statement the total cost of fixed capital to December 31, 1900, is given as \$555,428.69. In this there is included, according to the statement, a certain amount of overhead expense. If this percentage of overhead expense is applied to the entire cost of the property of the company as shown upon the books, we will obtain, approximately at least, the actual cost to the company upon this theory of amount of overhead charges.

The following shows how this view of the matter works out:

Total cost to December 31, 1900.....	\$555,428.69
Total overhead expense	\$103,510.20
Vouchered as expense	56,610.54
Overhead expense included	\$46,899.66
Deduct above overhead expense from total cost.....	46,899.66
Actual cost of labor and materials.....	\$508,529.03
Percentage of overhead expense included in total cost.....	9.2
Total cost as shown by the books December 31, 1911, including overhead expense	\$1,882,876.81
Deduct included overhead expense (9.2%).....	158,361.00
Actual cost labor and materials.....	\$1,724,245.81
18.6 per cent of this for assumed overhead expense.....	320,718.00
Total	\$2,044,963.81

The respondent's statement above quoted finds the overhead expense to be 18.6 per cent. This percentage is used to produce the above total, hence the total of \$2,044,963 would be the entire cost of construction if the same percentage of overhead expense is used as the statement claims to have been expended for the period extending from the organization of the company to December 31, 1900.

We may further note the difference between the estimated actual cost of labor and materials of fixed capital shown by the evidence and that shown by the books upon this basis:

Estimated cost labor and materials.....	\$2,117,763
Actual cost upon both assumptions.....	1,724,245
Difference	\$393,518

In the foregoing table the overhead charges claimed by the respondent are stated in the form of percentages. The following is the amount of the percentages for each class of overhead expense:

Engineering and inspection	\$201,239
General incidentals.....	30,888
Insurance during construction	9,374
Organization of business.....	143,835
Taxes and interest during construction.....	200,413
Piecemeal construction	256,439

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Promoter's profit	\$164,122
Brokerage	57,443
Total	<u>\$1,063,753</u>

It is also instructive to see how the percentage theory of cost works out in particular cases. We may first examine its results in the case of land.

Value of land as claimed by respondent.....	\$136,607
Actual cost as shown by its books.....	54,601
Difference	<u>\$82,006</u>

The difference is made up as follows:

Rise in value	\$48,054
Engineering and supervision.....	5,133
Organization of business	6,467
Taxes and interest during construction.....	13,711
Promoter's profit	6,398
Brokerage	2,243
	<u>\$82,006</u>
Total of overhead expense.....	\$33,952
Per cent of actual cost.....	61

Analyzing the estimated cost of reproduction new of the buildings, we obtain the following:

Value of buildings as claimed by respondent.....	\$204,451
Actual cost as shown by its books.....	135,148
Difference	<u>\$69,303</u>

The difference is made up as follows:

Increase estimated cost over actual.....	\$2,520
Engineering and supervision	13,766
Insurance during construction	651
Organization of business	9,125
Taxes and interest during construction.....	12,896
Piecemeal construction	17,410
Promoter's profit	9,573
Brokerage	3,358
	<u>\$69,303</u>
Total of overhead expense.....	\$66,783
Per cent of actual cost	49

It should be noted in the case of the land that the evidence does not explain why the sum of \$5133 should be

added for engineering and supervision. The theory as to the other charges is somewhat self-explanatory. In the case of the buildings it is quite difficult to understand how the contention as to piecemeal construction applies. Another point which should not be overlooked is that the architect's fees actually paid are included in the actual cost shown upon the books.

"Fair Value" of the Property Used in the Public Service

In *Smyth vs. Ames* (169 U. S. 466), decided in 1898, the Supreme Court of the United States said:

We hold that the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public.

In *San Diego Land and Town Company vs. City of National City* (174 U. S. 739), the same court said:

What the company is entitled to demand in order that it may have just compensation is a fair return upon the reasonable value of the property at the time it is being used for the public.

In *Cotting vs. Godard* (183 U. S. 79), the same court said:

It [the court] has declared that the present value of the property is the basis on which the test of reasonableness is to be determined, although the actual cost is to be considered, and that the value of the services rendered to each individual is also to be considered.

In *Willcox vs. Consolidated Gas Company* (212 U. S. 19), the same court said:

There must be a fair return upon the reasonable value of the property at the time it is being used for the public. In order to determine the rate of return upon the reasonable value of the property at the time it is being used for the public, it of course becomes necessary to ascertain what that value is.

In the case of *Westchester Street Railroad Company*, decided by this Commission April 24, 1912, an elaborate examination was made as to the meaning of the word "Value," and the conclusions there reached are those which have been universally adopted by economists.

The latest authoritative definition of "Value" which has been promulgated is that of Professor Taussig, in his recent work on Economics, in which he says:

The value of a commodity means in economics its power of commanding other commodities in exchange. It means the rate at which the commodity exchanges for others.

There is nothing new in this definition. John Stuart Mill says:

Value, when used without an adjunct, always means, in political economy, value in exchange or exchange value.

Jevons says:

Value, so far as it can be correctly used, merely expresses the circumstance of its exchanging in a certain ratio for some other substance.

Again,

Value in exchange expresses nothing but a ratio, and the terms should not be used in any other sense.

The language used in the Westchester case concerning the value of a street railroad is directly applicable to an electric plant:

Its one characteristic which gives it value is its supposed power to yield directly or indirectly a money return equal to the investment with a profit thereon. Its value lies, not in what it is but in what it will produce or what it is believed it will produce in money. Generally speaking, what it will produce in money depends upon its earning power, direct or indirect.

The foregoing language was used in a capitalization case, where the exchange value was directly in question and the matter to be ascertained by the investigation in hand. The present case, however, is a rate case. In a rate case, the exchange value can not logically be a basis of inquiry for the reason that the exchange value depends upon the net income, present and prospective: and the net income depends upon three principal factors, one of which is the rate, the others being amount of service sold and cost of operation. A reduction of rate which does not increase the demand for service necessarily diminishes the net income, and hence by so much diminishes the exchange value of the property

employed in the service. If the reduction of rate increases the demand for service, such reduction may increase the exchange value, provided the increase in service be sufficiently great and without increase in operating expenses sufficient to absorb the increased earnings.

Exchange value being dependent upon the rate, it is clear that such exchange value is not the subject of inquiry in a rate case. To base the rate upon the exchange value would be generally merely to continue the rate, and it would absolutely continue it so far as the value is dependent upon the rate. If the change in rate affects the net income, it changes the exchange value; and if there be no change in exchange value there can be no change in rate.

In a very careful and exhaustive report upon plans for ascertaining the fair value of railroad properties, submitted to the National Association of Railway Commissioners at their annual convention for the year 1912, the committee said:

But no one expressly contends that value for rate making purposes should be based upon the earnings of the property. If the rates are too high the earnings would be too high, and vice versa. One can not be used to justify the other, or else we must assume that whatever is, is right.

There would seem to be no escape from the conclusion that when courts have used the term "fair value" in rate cases, they had something in mind different from "exchange value," or in other words "value". It is not to be supposed that they did not comprehend that value depends upon the rate, and that a change in rate means a change in value if it affects net income. The earning power of a property is what determines its ratio of exchange. High net earnings will give it a high ratio of exchange. No earnings at all, either present or prospective, will deprive it of practically all value.

In the case of *Smyth vs. Ames* the court gave an elaborate enumeration of what should be considered in ascertaining "value". It says:

And in order to ascertain that value the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience.

This enumeration of matters to be considered may be regarded as a demonstration that the court did not have in mind "value" in its economic sense of "exchange value," since the matters enumerated do not lead logically or otherwise to a fixing of exchange value. It would be too much to say that anyone ever arrived at a conclusion as to how much he would be willing to part with for a given piece of property by any such process as is here indicated. If, however, the court was endeavoring to point out a method of reaching a just and reasonable conclusion as to the just and reasonable amount upon which the return should be allowed, it could not well have used better or more comprehensive language.

The result to be evolved from such a process as is indicated is the reasonable amount of the investment in the public service. If instead of "value" we were to say "fair amount of investment," we would satisfy in such an inquiry every elementary sense of justice and every requirement imposed by courts in their enumeration of the processes to be followed in reaching the desired result.

The organizers of a public service business at the outset of their operations are possessed of, or have power to obtain, a certain amount of floating capital which they may use in any way open to the investment of any such capital. The determination is made to convert this floating capital into fixed capital of a public service plant. The carrying out of this determination involves the destruction of the floating capital. The completion of the plant finds that the floating

capital is gone and the plant is the outcome of the destruction. Personal service, energy, and skill have also entered into the work of the creation of the plant, for which a pecuniary reward of some amount is just.

The reasonable sum upon which the owners of this new plant are entitled to a return is the amount of floating capital which has been sacrificed or destroyed in its production, and a just amount for the energy and skill which have been expended in producing the property which is useful in serving the public. The rate of return upon these amounts is variable, depending upon the rate which the floating capital might have earned in other employments, the risk of the enterprise, and the length of time it may reasonably be expected to earn returns. Generally speaking, these amounts may be summed up in one word, "Cost". Cost, however, can not be accepted as a fixed amount from which there can be no deviation. It may have been extravagant and wasteful. Clearly, the extravagance and waste are the loss of the owners, and should not be a burden upon the public. Skill and ability of an unusual order may have been displayed in constructing the plant, with the result of large savings in its cost as compared with cost under ordinary and average management. Such savings should be the reward of the skill and ability used in producing them, and can not be claimed as a matter of right by the consumer. Extraordinary misfortune may have occurred in the course of construction, enhancing materially the cost which might have been reasonably expected. Whose is the loss? The construction may have happened to fall in a period of either abnormally high or low prices. When prices have resumed what may be deemed to be their normal level, who is to reap the benefit of the one or bear the burden of the other — the owner or the consumer?

It is not essential to press this line of discussion further. Such considerations as the foregoing show that actual cost may not always be a basis upon which the return is to be

computed, although it is a factor of large importance as being the best test of the sacrifice made in constructing the public utility.

Practically, the cost or amount of investment is frequently impossible of ascertainment. The conditions surrounding the construction are unknown. The record of the expenditures actually made has not been preserved. Whether such expenditures were made judiciously or otherwise can not be known. In such circumstances, it is incumbent to seek some other method of ascertaining the fair amount of the investment, and the method which has been usually adopted in such cases is that of cost of reproduction new, with or without depreciation.

As a means of ascertaining the amount of the actual investment, it is confessedly imperfect. At best it can produce only an approximation. In most cases it varies so widely from the actual cost as to put the two in a position of actual hostility.

This method of ascertaining the fair amount of the investment, although it has been treated with great favor, is also subject to severe criticism. The first arises from the practical impossibility of ascertaining with any reasonable degree of accuracy the cost of reproduction new. This impossibility has been demonstrated in most attempts which are made. Engineers differ widely in their results, and this when their professional standing and integrity are in every respect equal. Most classes of work involve great difficulties in ascertaining the just unit prices, the amount and efficiency of the labor involved, the skill and push of the superintendents, the proper economies which may be practiced, the unforeseen delays and accidents. To provide against all possibilities of any character which may enhance expense, the experience of the engineer is usually dragged to its depths, his researches into the experiences of others are pushed to the uttermost. The result is that every work is charged with every expense, usually upon a percentage basis, which has ever been found to

be attached under any conditions to work of the character under inquiry. The result is inevitable. It is rare that all of the alleged expenses are found in any given work, and the resultant cost is swollen beyond all reason and beyond practical experience. The cost of reproduction new is the result of estimates, and estimates must always be considered and adjudged by the light of the circumstances under which they are evolved. An estimate to induce a plunge into an enterprise is not justly comparable with one designed to justify an existing rate of dividend.

The following quotation from the report to the National Association of Railway Commissioners, above mentioned, sums up one phase of the question with admirable cogency:

There is such a wide disparity in the prevailing methods of making values of railroad properties that in case two expert engineers, one just as honest as the other, were valuing the same property for the same purpose at the same time, one could arrive at a total value fifty per cent greater than that found by the other expert. This glaring difference in conclusions could easily and naturally follow from the simple adoption of different rules or methods which are today being used in actual practice by able and experienced engineers in different parts of the nation.

The chairman of the committee making this report, in his remarks to the Association, said:

There are thirteen subjects upon which I find substantial differences of opinion, as follows: Interest during construction, engineering contingencies, franchises, adaptation and solidification of roadbed, unit prices, land values, intangible values including working capital, development cost, promotion profits and high efficiency, unearned increment, depreciation, apportionment of values, investment and gifts.

He does not attempt to state a single point upon which there is an agreement, and it would be interesting for one to attempt to find a question not enumerated in the foregoing list of thirteen matters upon which there is not marked disagreement.

A further criticism upon the use of cost of reproduction new is that it is more obviously just to the consumer to charge against him the cost of reproducing the service rather than

the cost of reproducing the existing instrument of service. Such existing instrument may be inefficient or obsolete. If competition has its full force in a given case, the tendency is for the consumer to reap the full benefit of all improvements in character and design of the plant. If monopoly exists, the expense of construction, the ill design, will not be replaced except as the newer construction can be had upon terms which will reduce operating expenses. If the saving in operating expenses is reflected in the rate, the owner receives no benefit and can not afford to change. This condition of affairs results in the complicated problems to be solved in determining who shall bear the burden of obsolescence.

It is not necessary, however, to determine whether the cost of reproduction new should ever be used as the sole basis of value in a rate case. The practical question before us is whether it should be so used in the case now before the Commission for determination. In solving this question we must consider how it actually works out.

In the case under consideration there is no practical dispute as to quantities. They are given by the company. Each party has caused a firm of engineers to attach unit prices to materials and give estimates as to the cost of labor employed in installation. There is a wide difference in the results reached. The estimates appear to have been made very largely by employees of the respective firms who did not appear upon the stand, but their tabulations and work were reviewed and revised by their principals who did give evidence as to their judgment that the results finally produced were correct. It is not to be understood that the principals did not give considerable attention to the details, but in the main the work was obviously done by subordinates. The difference in results arises largely from different unit prices for materials and different estimates as to the amount of labor required in performing the work, with a very wide difference in theory as to the overhead expenses so called: that is, the amounts of percentages which are to be added for

engineering, supervision, interest during construction, and the like. There is no possibility of reconciling the evidence. There is no possibility of determining who is in the right as to a large number of matters in controversy, amounting to very material sums, without making inquiry outside of the case. The Commission has undertaken such a task in another case, with results therein detailed, which were wholly unsatisfactory and of no assistance whatever.

This case is unusual in that the books of the company have been well kept, and together with the vouchers show accurately the outlays which the company has made in the public service. There is no uncertainty about the matter whatever. There may be some questions of detail as to whether particular expenditures were properly allocated to operating expenses or to capital, but such details are practically inconsequential in the general result. We therefore are confronted with the fundamental question whether in determining the amount of the fair investment upon which the return shall be made, in other words the value, we shall give chief weight and importance to the actual cost to the company within a recent period as disclosed by its own books, or allow that cost to be overridden by the conflicting proof which is submitted of what the witnesses think the property would now cost if reproduced.

The first objection to the cost of reproduction new in this case is that it is based upon an assumed state of affairs which did not obtain in the actual construction of the plant. This assumption is that the plant is to be constructed as an entirety within the briefest possible period. It is not considered as a growth from a simple beginning, but as evolved from the plans of engineers covering the whole system, and the construction proceeding with all reasonable dispatch so that the plant is brought into existence and put in service at one time. It assumes practically that the whole plant is ready for service before any business is secured. This assumption does not correspond with the real facts of the

case. The company was organized in 1896. As late as the close of 1900 we find that the money investment was only about \$500,000. In 1908 the investment had risen to about \$1,500,000, and at the close of 1911 it had gone up to nearly \$1,900,000. Extensions were built, generally speaking, for serving business which was ready to be served. An extension of the distributing system would be made to reach a particular industry or business, and as soon as completed the load would be taken on. The engineering has largely been done by engineers in the regular employment of the company at a cost very much less than the percentage assumed by the company's witnesses; and as is shown by the books, large portions of the sums required as theoretical overhead expenses have never been paid.

Again, the large sum of \$256,439 is added by the respondent to the costs because of piecemeal construction. In other words, the theory is that the plant could have been constructed upon the assumption just stated for the sum of about \$3,000,000, but having actually been constructed by piecemeal, \$250,000 should be added to that sum by reason of the extra expense incurred.

It must be confessed that this addition for piecemeal construction has logical difficulties which, however, need not be discussed for the reason that the books of the company demonstrate that the piecemeal construction which actually took place was much cheaper than the construction upon which the calculations of the company's witnesses are based.

The evidence as to the reproduction cost new given both by the company and by the City is unsatisfactory in those elements upon which the determination must be based. The quantities not being controverted, the differences arise as to unit prices and labor costs. Upon these points we have merely the judgment of a limited number of reputable engineers skilled in their profession, of considerable experience, but obviously having different experiences and resorting to different sources of information. Thus, a large part of the valuation of the property consists of sub-station equipment.

It is well known that quotations as to the price of machinery of this character are little to be depended upon. There is no such thing as an established fixed price, and the manufacturing companies make their prices in accordance with the circumstances of the case; and quotations furnished by them are entitled to but very little weight. The difference between actual cost and quotations for the same articles are at times very striking.

The percentages used by the witnesses for the company for the so called overhead expenses are not such as can meet with approval. They amount to 49 per cent of the estimated cost of labor and materials. This is wholly out of line with the experience of the Commission, and is not in accord with the experience of the company. No evidence was introduced showing that any such percentage of expense has ever been actually incurred in construction.

It should properly be observed at this point that the question presented is different from that to be solved in cases requiring capitalization for new construction. In capitalization cases, it has to be recognized that engineering, interest during construction, and other expenses of like nature, will be incurred. There is no means of determining in advance with accuracy just how much they will amount to. They are necessarily and unavoidably the subject of estimate. Labor and materials costs are also the subject of estimate. No one pretends that any such estimate is absolutely accurate or can be so made. It is simply the best that can be done under all of the circumstances of the case, and the practice of the Commission is to provide that the money raised shall be carefully accounted for, and if there be found to be any excess it shall not be used for any purpose without the further authorization of the Commission. No one assumes that the estimate is conclusive. It is merely tentative for the purpose of enabling the corporation to obtain a sum of money which as nearly as may be judged in advance will be sufficient for the work in hand.

Without prolonging the discussion, the conclusion of the Commission is that in this case the fair value of the property used in the public service, or what is equivalent thereto, the fair amount of the investment upon which the return should be computed, may be better ascertained by giving the greater weight to the actual cost as the basis of the inquiry than in any other way. This actual cost may require diminution if it should be found that the expenditures were extravagant or wasteful. It may require increase if it be found that any of the property has actually increased in value since it was brought into the public service, and it may require increase for other reasons. It is not assumed that the actual amount of money expended by the company and placed upon its books as the cost of the property is the fair value. It is, however, assumed that such cost taken as the chief basis of investigation will lead to more just and equitable results than any other one basis which is afforded by the evidence in the case.

"Going Concern" Value

The company makes a claim for going concern value. The amount claimed is somewhat uncertain. The witness Jackson places the going concern value at 10 per cent of \$3,504,000, or \$350,400. The witness Metcalf places it at \$996,000; the witness Almert at \$300,000.

In their brief, the counsel for the company aggregate several items as follows: Reproduction value new plus 1912 additions plus going concern value (Jackson), \$3,988,913. It is not clear which one of these estimates of going concern value the respondent relies upon, and it is not important at this time to settle that matter. The question to investigate is what constitutes going concern value in a rate case, and what is its proper place in an estimate of the investment or fair value of the property upon which a return should be allowed.

Going concern value, so called, either under that name or something similar thereto, has in the last few years excited

a great deal of attention and controversy before commissions and courts, with the result, as is usual in such cases, that we have various divergent and irreconcilable decisions. It is believed that at the outset an examination of the principles connected therewith will be more useful than an examination of the decisions.

The question of going concern value has arisen in two distinct classes of cases, namely those of purchase and those relating to rates. The principles applicable to one class have been sometimes applied to the other class, and therefore, if there is any distinction between the two, confusion has arisen. We may therefore first inquire whether the same principles are applicable to both classes of cases.

In purchase cases, the point to be determined is how much should be parted with by the purchaser for the purpose of acquiring the entire property, including the business attached thereto. The inquiry is as to the exchange value of the property: that is, the sum or amount which should be parted with by the purchaser in order to acquire that which he desires. The exchange value is, in case of a property whose function is simply to earn money, determined primarily by the earning power; not alone the earning power at the moment, but the earning power at the moment plus prospective earning power over a period of years. If the earning power is large, the price to be paid will be correspondingly large. If there is no earning power connected with the property, then the price will be what is ordinarily termed scrap or junk value, which means that the property has only that value which can be realized when it is sold for purposes other than those for which it was constructed. A plant without any business either actual or prospective of the kind which it was designed to serve has no earning power, and therefore will have no exchange value except as the physical property may be diverted to some other use which has an earning power. The exchange value depends upon the amount of net earnings. If we consider two plants the

cost of whose physical property is the same, but one of which pays a 10 per cent dividend and the other a 20 per cent dividend upon such cost, with a reasonable prospect that the dividends will continue in the same proportion in the future, the value of one plant is clearly much greater than that of the other, not because of the greater cost of the property or the greater amount invested therein, but because of the greater value of the business attached thereto. It has a greater value as a going concern. These considerations demonstrate that in purchase cases the value of the property depends upon what can be got out of it in the way of net income. This in turn depends upon the volume of business, the operating expenses, and the rate charged. When the value of the property is considered in purchase cases, that value is the exchange value: the rate is always assumed, and is never in question. The rate actually charged is the one which is taken to be the fair and reasonable rate, and it is invariably taken to be a fixed fact in the case concerning which there is no dispute. This differentiates purchase cases from rate cases. In purchase cases the inquiry is, what is the exchange value of the plant? What is its earning power, present and prospective? And upon the amount of that earning power depends the determination in the case.

In rate cases, the question in determining the value is not how much has been or can be got out of the property, but how much has been put into it, in order that from that fact it may be determined how much may be reasonably taken out of it in the way of net income. The cause of complaint in a rate case, and hence the point in issue, is whether too much return has been obtained from the public, and whether that return ought not to be cut down to a smaller sum: whether the net income is not too large and should not be smaller. In such a case the earning power of the plant is uncertain until the decision as to the rate is made, because that is the very thing the controversy is about. It

follows that in a rate case the earning power can not be considered in determining what is the value of the property for the reason that such value depends upon the earning power and the earning power depends again upon the rate, and the rate depends upon the decision which may be made in the case.

This distinction between value in purchase cases and in rate cases is so fundamental and so vital to an understanding of the subject that it is well to devote further attention to it. Perhaps no better illustration can be framed than by showing the practical application of the distinction in the case of the company whose affairs are under consideration. That company claims the value of its physical properties to be \$3,504,000, and this for the purposes of the discussion will be assumed to be correct. Its gross income from operation in the year 1911 was \$363,000: that is, that was the sum which it had left from earnings after paying its operating expenses and taxes. It is not an unreasonable assumption that any property having a monopoly, well established in business, with a present highly remunerative business and with a prospect of increase in business, is capitalizable at a sum of which its gross income is 6 per cent. Money is seeking investment at less rates, and any property with the certainty of return equal to that afforded by the Cataract company can find plenty of money to invest therein at a return of 6 per cent. Capitalizing the gross income of \$363,000 at 6 per cent, we find that the property would be worth \$6,050,000. Upon these assumptions the conclusion is that the fair exchange value of the entire property of the company is this sum of \$6,050,000; that this is the ratio of exchange which it would possess; that a willing purchaser would be willing to part with that sum in view of a certain return of 6 per cent or \$363,000 annually thereon. The assumed value of the physical property of the company is, as claimed by the company, \$3,504,000. Deducting this sum from the total value of \$6,050,000, we have an intangible

value in excess of the physical value of \$2,546,000. Upon the theory that going concern value is the value of the attached business, the going concern value of the Cataract company is either the whole or some part of this sum of \$2,546,000. The return at 6 per cent on the assumed value of the physical property would be \$210,240, and the return at 6 per cent upon the intangible value of \$2,546,000 would be \$152,760. This includes the return upon the going value, whatever that may be.

The earnings from operation during the year 1911 were \$1,516,000. If the rates of the company were reduced so as to make a cut in the gross earnings of 10 per cent, such cut would be \$151,600; and if it had been made for the year 1911, the earnings from operation would have been \$1,364,400. The operating expenses and taxes for the year as reported by the company were \$1,153,000. Deducting these from the earnings from operation the remainder would be the gross income, or \$211,400, which is only \$1160 in excess of a 6 per cent return on the claimed physical value.

It must be taken as a fact that under the decision of the Supreme Court there must be a return upon the physical property to the amount of its assumed value of \$3,504,000, of at least 6 per cent, which would amount, as above stated, to \$210,240. As above shown, in a purchase case, it is the earning power of the property which fixes the price that must be paid for it by the purchaser, and if the purchaser is not willing to pay that price he has the option of letting the property alone; and it is quite immaterial whether we assume in this case that the full exchange value of the property is the sum of \$6,050,000, or some lesser sum which is in excess of \$3,504,000. Having an earning power which returns more than 6 per cent upon \$3,504,000, the argument is that it has a going concern value which is a part of its exchange value in excess of \$3,504,000. This being so, the question becomes at once, how is it possible to cut the rate of the company without confiscating *pro tanto* that value

which is known as going concern value? Taking the figures used above, a cut of 10 per cent in the rates of the company practically annihilates the going concern value. If it can not be confiscated as a whole, neither can it be confiscated in part. The difficulty in the case is at once dissipated when it is considered that exchange value, that is to say, the value which is derived from earning power, is not and can not be the value to be considered in a rate case. It can not be too often repeated that exchange value depends upon earning power as exhibited in net income, while one question in a rate case is whether the net income is unreasonably large; and if it is unreasonably large it should be reduced.

If the net income is taken as the test of value, as it must be in considering exchange value, then it is impossible to make a reduction of rates by governmental authority; because the reduction necessarily creates a reduction in net income, and the reduction in net income necessarily reduces the exchange value, and this can plausibly be urged to be confiscation; and is, in fact, if the exchange value is to be taken as the value which is made the basis of computation in a rate case.

I think it must be taken as clear upon principle that there is a fundamental distinction as to going concern value between rate cases and cases of purchase.

Directing attention next to the principle involved in rate cases, it is to be observed that the discussion hereinbefore had demonstrates that in rate cases going concern value, if it exists, is not to be found in the amount of the earnings. It must therefore be considered as arising from either a deprivation suffered by the company in not receiving a proper return upon its investment at some prior period in its history or in some expenditure which it has made for obtaining the business, which expenditure is separate and distinct from any expenditure made in putting its plant in a condition to render service. The argument is that such deprivation of returns upon the investment

made by way of dividends, or that such expenditure by way of attaching business to the property, is as much a part of the real cost of the property upon which the company is fairly and equitably entitled to returns as the money which has been put into the construction of the physical plant. Hence it is that one definition of going concern value is that which has been adopted by the respondent in this case, namely, the cost of attaching business. These two bases, namely loss of dividends and expenditure of money, should in any proper analysis of the matter be separated. There should, however, be first taken into consideration a matter which is common to both. This matter is the assumption, always implied and never stated, that the plant has a value equal to the construction cost, either actual or estimated, and this without any business attached thereto; and that to this cost there should be added the amount of deprivation of income or the amount of the expenditures made for business, or both. This assumption is not just. The construction cost is not the exchange value of the property. The construction cost may have been entirely wasted except so far as scrap value is concerned. Nor does it follow that the construction cost as being the amount of investment can always be taken as the sum upon which the return to which the owner is entitled should be computed. There must always be taken into consideration in these matters the location of the plant, and the business, either present or prospective, which may be served at such location. The plant of the Cataract company is located in Buffalo because there is business there which may be served, or there is potential business in that city which it is more than probable will be served; and the value of the plant, either exchange value or investment value, depends upon the existence of customers to be served.

We may suppose for the sake of the argument that the plant of the Cataract company, instead of being constructed in Buffalo, had been erected at some village in the county

of Erie without any manufacturing interest or railroad service, say at Collins Center. Leaving out of consideration for a moment the possibility of long distance transmission, the plant at Collins Center would have no value except scrap value: that is, such value as might be found in taking the materials and selling them for use in some other business.

Considering the plant to be erected at some remote and inaccessible point, say in Greenland, where there would be neither local demand nor possibility of long distance transmission of power, the property would not have even a scrap value, for the reason that the cost of moving it to a place where the materials could be available in another business would exceed the value at such other point.

The physical property of a plant of the character of that owned by the Cataract company has no value other than scrap value except as a going concern, and when a proper allowance has been made for the value of the physical property, meaning thereby a proper investment value, including every element which goes into that, it must include an estimate for the property as a going concern; and the going concern value is necessarily represented in that estimate. The very act of giving a value to the physical property assumes that it is a going concern, assumes that it has a business, and that that business is in some degree related to the normal capacity of the plant.

Having this fundamental distinction clearly in mind, we are now ready to proceed to an examination of the two elements of going concern value above stated, namely, money expended in attaching business to the property, and abstention from or deprivation of dividends.

Taking first the question of expenditures made in attaching business, it is universally recognized that it is proper for the company to claim reimbursement from the public for such expenditures. They are, however, universally recognized and treated as a part of the operating expenses. The

company is obliged almost invariably to solicit business at the commencement of its operations and is equally obliged to continue the same during subsequent years. There is no year in which a well managed company does not expend with greater or less liberality for the purpose of either holding business or acquiring new business. Such expenditures are recognized in the Uniform System of Accounts prescribed by this Commission as legitimate charges to operating expenses. Accounts 552, 553, 554, and 555, prescribed for electrical corporations, provide for promotion expenses incurred in the promotion or development of electric consumption, for advertising, for canvassing and soliciting, and for promotion, wiring, and devices. The respondent itself is constantly incurring such expenses and charging them to operation. It reported expenditures chargeable to this account in 1908, \$5959; 1909, \$10,413; 1910, \$4727; 1911, \$4329. These figures are cited to show that the company is now incurring expenses for attaching business and has been incurring such expenses during recent years. These expenditures are, however, operating expenses, and must be treated as any other operating expense; and the question is whether in any event such operating expenses constitute an investment upon which the public is obligated either legally or equitably to pay a return the same as it is upon the fixed capital of the company. Obviously, if the earnings from the business have been sufficient to pay these operating expenses and no deficit or indebtedness has been incurred thereby, no just reason exists for claiming that any portion of them, whether incurred for advertising, soliciting, or any other purpose, constitutes a sum upon which the public must pay returns. It has already paid them the moment they have been charged to operating expenses.

If the earnings from operation have been insufficient at any time to pay the operating expenses, a different question may be presented, and it is this: Is the company entitled as a matter of either legal right or reasonable equity to have

deficits in its operating expenses paid by the public? If these deficits constitute property which is invested in the business, then of course the public is legally obligated to pay a return thereon in order to avail itself of the services of the company. If the fact that the company has suffered a loss in operating expenses constitutes the amount of the loss a property investment in the business, it inevitably follows that the public must guarantee the company against loss from operation. No such principle has ever been laid down in any court and it is apprehended never will be.

There is, however, another view of the matter which should carefully be considered, and that is: Although the company may not have a legal right to have such loss treated as a part of its property, still, as a matter of substantial justice, such loss may be considered in fixing the rate so that in order to obtain for the public service the company may from the rate recoup itself for such loss and be made whole. To state the matter in another form, the loss is not an investment in the business but it is a circumstance which may justify a higher rate when the business does become remunerative than would be just if no such loss had been incurred.

Clearly, there is a very marked distinction between treating such a loss as a property right upon which a return may be legally demanded as a consideration of service, or as a circumstance which may in fairness and equity require that the company should be given a rate which will enable it to reimburse itself for the amount thereof. That this distinction is real and substantial there can be no doubt. If the company in any given year has suffered such a loss in operating expense, and in the next year in addition to a reasonable and proper return has been repaid such loss, obviously it should not continue to be repaid the amount thereof during the succeeding years indefinitely. It should be repaid only once. If the loss is treated as an investment in the property, then the company is fairly entitled to have it considered as an investment upon which it may receive a return of 6 per cent, and also a further return which will amortize the

loss at some future period. The mere statement of this result shows the absurdity of such a treatment.

The conclusion is, that so far as moneys actually expended in the past for attaching business to the property after the period of operation has commenced are concerned, they must be treated as operating expenses and can not be considered in any event an investment in the property upon which the company is lawfully entitled to a return. If this view is correct, they are no part of what may be termed going concern value.

Considering now the question of whether a failure to obtain proper returns for capital actually invested in the business either during an earlier or a later period constitutes a property right and investment in the business upon which the company is entitled to a return which can not be reduced below 6 per cent per annum upon pain of being considered confiscation, it is to be observed that this in another form is precisely the principle which this Commission refused to recognize in the case of the International Railway Company. In that case it was contended that the company was entitled to a reasonable return upon the assumed value of its property, and that when it failed to earn such sum as was deemed to be reasonable it was entitled to capitalize the deficit; and upon this process of reasoning it figured up a capitalization of about \$10,000,000, this capitalization arising wholly from a failure to earn what the company considered to be a proper return. The Commission declined to recognize this contention, observing, among other things, that it produced the somewhat curious result that the greater the loss the greater the value of the property. The same remark applies here. If the company suffered no deprivation of dividends at the commencement of its operations, it has no going concern value from this source. If, on the other hand, during the first years of its operation it received no dividends, the argument is that it is entitled to capitalize the amount of a reasonable dividend as an expense which it incurred in getting the business started, on precisely the same ground

that it is entitled to capitalize interest paid during construction.

Analyzing this contention, we must first observe that it is based upon the assumption that the investor has a legal right to a reasonable dividend upon the amount invested by him in the property, and that if the public fails to patronize his business sufficiently to pay that dividend in one year, the patrons of the business thereafter must make it up and pay a return which will treat such loss as an investment in the business. As stated above with reference to operating expenses, clearly there is no such legal right. A failure to receive returns from a business is not an investment in the business. If the principle of failure to receive returns from the investment in the business constituting a further investment in the business were to be applied throughout the country, the results would probably be somewhat startling. Whether it constitutes an equitable ground which may justly be taken into consideration and in the exercise of a just discretion allowed for in fixing a rate, is entirely another matter.

The conclusion, therefore, is that deprivation of returns upon the investment after the operating period has commenced does not constitute an investment in the business and a property right which must be recognized as part of the fair investment value of the business and which must be recognized in the rate both for return upon capital invested and for destruction of capital.

The next question is whether such deprivation of return or loss of dividends and such expenditures for attaching the business may be fairly and reasonably allowed for in the rate which is fixed. Obviously, this depends upon the question of whether such deprivation occurred and such expenditures were made. No allowance can be made for anything which was not. No allowance should be made for an expenditure which was not incurred, or if incurred has been repaid. No allowance should be made for a dividend which was not paid unless it was equitable and just that the dividend

should be paid and was in fact not paid. In this case the respondent has made no proof of such expenditures or losses. It has stood upon the theoretical proposition that any going concern has a going concern value in addition to that value which is allowed to the physical property in consideration of its being a going property. There is, accordingly, no justification in the direct evidence for any assumed expenditures or losses in the earlier years of the business. We may assume that expenditures were made in the earlier years of the business which have not been shown. We know that they have been made in the later years from the reports of the company above quoted. We know, however, that these expenditures have been charged to operating expenses. We know that the operating expenses have been paid by the public and that the returns from operation have always been greater than the operating expenses. These considerations show that no return should be made in the rate because of expenditures made for attaching the business, it being plain that all such expenditures have been heretofore paid by the public.

As to the losses in dividends, that will be a matter for proper consideration in another connection, observing however at this time for the sake of clearness that the company has established no just claim whatsoever to any return in this case for going concern value except such as is found, and necessarily found, in the value of the investment in the physical property.

It would be a labor of no value to attempt to review all of the cases which have been before courts and commissions in which the question of going concern value has been considered.

Speaking of this matter of going concern value, a recent work upon the valuation of public utility properties, by Henry Floy, says:

There is no element included in the total valuation of utility properties concerning which there is greater difference of opinion or more controversy and indefiniteness with regard to methods of its evaluation.

This statement is correct as far as it goes. To it might well be added that there is great controversy as to what going concern value is, and whether it should be considered at all in rate cases.

The views hereinbefore expressed are believed to be well supported by judicial decisions. Some of these decisions are as follows:

In *Cedar Rapids Water Company vs. City of Cedar Rapids* (118 Iowa 234), the Supreme Court of Iowa said:

It is proper here to say that in reaching these conclusions we have not attempted any estimate of the "going value" of the water works as a distinct and separate item in the calculations. By "going value" we understand is meant that value which arises from having an established "going" business. While not the exact equivalent of "good will" as applied to ordinary business, it is of a somewhat similar nature and attaches to the business rather than to the property employed in such business. The fact that the business is established is of course a material fact in ascertaining the value of the plant, and especially is this true where the property is being estimated for the purpose of sale or condemnation; but as a basis for estimating profits, its signification is less apparent.

In the matter of the arbitration of the valuation of the property of the Cleveland Railway Company had in 1909, the arbitrator was Judge Robert W. Tayler of the United States District Court, and in his decision he says:

I allow nothing for going value. Going value raises a question of definition, and it is sufficiently disposed of according to my view by saying that it only has a value as applied to a street railroad enterprise because of the expenses incident to organization, superintendence, administration, legal expenses and interest during construction; it is involved in the general subject of necessary overhead charge and arises only out of and is to be defined and limited entirely by the money necessarily expended to put it into shape where it has value as an operating instrumentality. Beyond that I recognize no value to going value or no such thing as going value to be applied to a street railroad enterprise.

In *Consolidated Gas Company vs. City of New York* (157 Fed. 849), District Judge Hough disallows good will value, which he treats substantially the same as going concern

value. His remarks upon this subject are too long to quote, and it is only necessary to say that when the case came before the United States Supreme Court (*Willcox vs. Consolidated Gas Company*, 212 U. S. 19), the court said:

We are also of opinion that it is not a case for a valuation of good will.

In the case *Knoxville vs. Water Company* (212 U. S. 1), the court below had added to the appraisal \$60,000 for "going concern," as well as \$10,000 for "organization, promotion, etc." On this the court said:

The latter sum [\$60,000 for "going concern"] we understand to be an expression of the added value of the plant as a whole over the sum of the values of its component parts which is attached to it because it is in active and successful operation and earning a return. We express no opinion as to the propriety of including these two items in the valuation of the plant for the purpose for which it is valued in this case, but leave that question to be considered when it necessarily arises. We assume without deciding that these items were properly added in this case.

This language can be construed in no way except that the court was of the opinion that going concern value was a subject yet to be passed upon by it as a proper element in a rate case.

In the case *Cedar Rapids Gas Light Company vs. Cedar Rapids* (144 Iowa 426), involving the valuation of a gas plant for rate purposes, the court said:

Also the sum of \$100,000 was included by this witness as enhancement of value by reason of being a "going concern".

It follows this statement with some discussion which is not as logically perfect as might be desired, but does make the statement:

Save as above indicated the element of value designated as "going concern" is but another name for "good will" which is not to be taken into account in a case like this where the company is granted a monopoly. The witnesses for plaintiff took into account "good will" in giving their opinion of the enhancement in value because of being a going concern, and we have no means of separating these so as to ascertain their estimate of the separate advantage of completion so as to earn a present income.

This case went to the Supreme Court, which affirmed the action of the state court in sustaining the rates in question. The case is reported in 223 U. S. 655, and was decided in March, 1912. At page 669 the court uses the following language:

Then again, although it is argued that the court excluded going value, the court expressly took into account the fact that the plant was in successful operation. What it excluded was the good will or advantage incident to the possession of a monopoly, so far as that might be supposed to give the plaintiff the power to charge more than a reasonable price. An adjustment of this sort under a power to regulate rates has to steer between Scylla and Charybdis. On the one side, if the franchise is taken to mean that the most profitable return that could be got, free from competition, is protected by the Fourteenth Amendment, then the power to regulate is null. On the other hand, if the power to regulate withdraws the protection of the Amendment altogether, then the property is naught. This is not a matter of economic theory, but of fair interpretation of a bargain. Neither extreme can have been meant. A midway between them must be hit.

In the Des Moines Gas Case the Special Master in Chancery excluded going value, saying:

In my judgment, after considering the able and thorough arguments of counsel, it is decisive of the question and holds that "going value" should not be considered in determining the basis upon which the complainant is entitled to have its return reckoned, and I feel it is my duty to so state. The physical value as hereinbefore determined is reckoned upon the fact that the plant was in successful operation when the earnings so indicated, otherwise its value would be much less. The "going value" is that enhancement which results from a well developed and paying business.

In the case *Mayhew vs. Kings County Lighting Company*, decided by the Public Service Commission of the First District of this State, "going value" was disallowed except so far as it was represented in construction costs, including promotion and organization, contractor's profits, engineering, supervision, etc.

The same Commission, in the case of the *Queens Borough Gas and Electric Company*, decided in 1911, had under consideration the proper treatment of early losses or the cost

of establishing business, and its conclusions are stated in the following language:

But it ordinarily happens during the first few years of operation that the company does not earn a fair return. How, then, are the investors to be made whole?

There are two solutions. One is to capitalize the losses or deficiencies below a fair return and all the other elements which are said to be included in "going concern". This would be accomplished by using the proceeds from the sale of stocks, bonds or notes to pay expenses for "going concern" and a fair return to investors. To use money from such sources to pay dividends would be absurd, dangerous and unjustifiable. If such a practice were started, where would it end? Probably in bankruptcy and dissolution.

The use of capital moneys to pay current expenses after operation has been begun is open to similar criticism. Who is to determine whether a canvasser, an accountant, an engineer, or a laborer is to be paid out of capital or earnings? All are connected with the *operation* of the plant, but if the theory is sound that "going concern" expenses are to be charged to capital, the wages or salaries paid to certain employees must be paid out of capital. Who is to decide when this shall be done, or when it shall cease after it has once been started? How may one determine when an employee is contributing to "going concern"? It is easy to fix a date when the construction period ends and operation begins, but how may one know when "going concern" expenses cease? To follow this solution of the problem would open the door wide to overcapitalization, financial manipulation and the misappropriation of funds.

The other solution is to charge all such expenses to operation, to attempt to make no fine-spun distinctions and then to permit the company to charge in later years rates sufficient to offset its deficiencies below a fair return in the first few years. This method involves no questions as to capitalization and can not result in the inflation of securities. Ordinarily, the company which is wisely managed follows this very course and works out an adjustment by itself. Questions arise only when the State, through some agency, is called upon to determine whether the rates are reasonable. Then the rate of return to be allowed upon the investment should be such as to offset losses in early years. This principle is adopted in this case, and no further allowance is made for "going concern" in determining the fair value of the property. When we come to the discussion of a fair rate of return, the other phases of this principle will be considered.

There are other cases which are irreconcilable with the views herein expressed and with the cases cited. They have

been given careful examination. The reasoning, where any existed, has been carefully analyzed, with the result that the Commission is convinced that the views hereinbefore expressed are the ones which it should follow in rate cases; and therefore going concern value is disallowed in this case as a separate item of property upon which the company is entitled to receive a return except as it is reimbursed in the general valuation of the plant.

What, if any, allowance should be made in the rate to recoup the company for any supposed lack of profits to which it was fairly entitled or expense incurred in establishing the business should now be considered.

Should an Allowance for Deferred Profits or Expenditures Made, Be Made in the Rate?

In considering the question whether an allowance should be made in the rate for deferred profits or actual expenditures made, or both, it may be well to consider, first, an assumption which runs through the evidence of the three witnesses sworn on behalf of the respondent that it is almost, if not quite, a matter of course that these elements necessarily exist in the case of any company. This feeling seems to be entertained by counsel for the respondent in their brief in calling marked attention to the fact that "the City has offered no testimony to controvert our claims in this regard [of going concern value]".

Mr. Jackson defines this element of value as "the value that comes from associating or attaching a plant to its business which vitalizes the plant and gives it an earning capacity". He speaks of it as a value additional to the cost of the plant; and as his evidence is understood, what he has in mind is earning power. He indicates, however, one way of ascertaining such value to be the making of calculations or estimates of the cost which a duplicated plant, which he calls a phantom plant, that is ultimately expected to cover the same territory, for the purpose of ascertaining the cost,

would be required for getting the income, the business associated with this phantom plant.

The witness Almert seems to put the value upon the basis of expense obtained in attaching the business, for which the company should be reimbursed, and he says: "I have made an allowance for advertising and soliciting of three-quarters of a cent per watt of the load connected, which in this case amounts to \$300,000." He says this is a part of the going value, but not the whole of it.

The witness Metcalf defines going value as the value of the creating or existing income of the plant. He says: "The two methods which have been used might be termed in a general way the cost of developing business; and the second, the going value, determined by the method of reproduction." Further, he says: "Whereas the other method involved the determination of the cost of reproducing the income as of today, the idea being to reproduce as of today the income in a similar manner to that which you reproduce the cost of the physical plant as of today."

While the matter is not entirely clear, it would seem that all of the witnesses have in mind either a method of estimating the actual cost of developing the business or the assumed cost of developing an equal business with a phantom plant. They have different theories or methods for arriving at their results. It is well to compare these theories with the actual experience of the respondent.

The following table discloses the experience of the respondent for the last six years of its existence, in these respects:

Period	Actual expenses attaching business	Dividends paid	Operating revenue	Operating income	Net increase in fixed capital	Total cost of fixed capital at close of period
Year ended June 30, 1906.	\$3,048	\$140,000	\$728,194	\$271,100	\$122,874	\$1,093,110
Year ended June 30, 1907.	3,739	\$99,997	889,610	806,282	216,424	1,309,534
Six months ended December 31, 1907.	1,789	\$120,000	504,190	138,801	139,771	1,449,305
Year ended December 31, 1908.	5,959	120,000	1,068,631	264,782	121,388	1,570,693
Year ended December 31, 1909.	10,413	120,000	1,211,930	211,973	48,322	1,619,016
Year ended December 31, 1910.	4,727	150,000	1,407,171	347,099	123,098	1,742,114
Year ended December 31, 1911.	4,329	120,000	1,616,100	363,138	140,763	1,882,877
	\$34,004	\$869,997				

¹ Year ended December 31, 1905. ² Year ended December 31, 1906. ³ Year ended December 31, 1907.

Under the Uniform System of Accounts prescribed by this Commission, each electrical corporation is required to keep an accurate account of all expenses of this nature. This system of accounts was in operation for the years 1909, 1910, and 1911. An examination of the reports of the company shows that it substantially kept the same account for three years preceding thereto, and accordingly the second column shows the actual expenditures made by the company in attaching business during the six years ended December 31, 1911, and the total amount is \$34,004. These expenditures were charged to operating expenses, and therefore the company has been reimbursed fully in this respect, unless there was a deficiency in dividends which it ought to receive. The column headed "Dividends paid" shows dividends which it actually received during these six years, and the total amount thus received was \$869,997; so that so far as this period is concerned, the company has been remunerated with reasonable liberality, considering the fact that not one dollar was put into the company by the stockholders from their own pockets, the plant being constructed entirely from proceeds of bond sales and from income derived from operation.

Another fact of great importance is that the column headed "Operating revenue" shows that such revenue for the year ended June 30, 1906, was \$728,194; while for the year ended December 31, 1911, it was \$1,516,100. The increase in business during the last five years was therefore \$787,906, while all of the expenditures for inducing this increase made during the time were \$34,004.

According to the witness Metcalf, the cost, as it might be termed, of acquiring the business for the phantom plant was \$1,000,000. Apportioning this cost to the business acquired during the last five years, we find that upward of \$500,000 of it is assignable to that period, while the expense actually incurred was \$34,004. It may be answered to this that the expenses were incurred during the previous history of the

company. There is nothing, however, to show that this is the fact, and an analysis of the accounts of the company would show that it is not a fact.

However, the subject is not yet exhausted. The following table is a classification of the operating revenues of the respondent for the six years ended December 31, 1911, showing the source from which its revenue was derived:

Revenues classified by certain selected sources:

Source of revenue	Year ended June 30, 1906	Year ended June 30, 1907	6 mos. ended Dec. 31, 1907	Year ended Dec. 31, 1908	Year ended Dec. 31, 1909	Year ended Dec. 31, 1910	Year ended Dec. 31, 1911
City of Buffalo.....	\$37,500	\$37,500	\$18,750	\$72,613	\$79,671	\$83,701	\$78,615
International Railway Co.....	\$250,233	240,907	147,691	322,350	333,896	386,782	419,510
Buffalo General Electric Co.....	\$190,000	\$230,000	138,560	247,123	258,873	296,781	319,822
All other sales of current.....	238,839	377,211	208,950	413,305	538,460	638,640	697,450
Miscellaneous electric revenues.....	2,622	3,992	2,230	3,050	1,060	1,367	1,127
Total operating revenue.....	\$728,194	\$889,610	\$504,190	\$1,058,531	\$1,211,930	\$1,407,171	\$1,516,100

: Estimated on basis of 1907 figures.

: Estimated on basis of amounts paid for "hired power" by International and Croastown Street Railway companies as reported by them.

: Estimated on the assumption that the cost of power purchased by the Buffalo General Electric Company from The Cataract Power and Conduit Company in the years ended June 30, 1906 and 1907, bears the same relation as in the six months ended December 31, 1907 (about 98 per cent) to the total cost of power purchased by the Buffalo General Electric Company from all sources.

An analysis of this table shows that for the year ended December 31, 1911, of a total revenue of \$1,516,100, \$817,517 was obtained from the City of Buffalo, the International Railway Company, and the Buffalo General Electric Company; and \$1127 from miscellaneous electric revenue, which to some extent at least was not derived from the sale of electric energy; leaving for its power business generally total receipts of \$697,456. It will not be claimed that there was any appreciable amount of expenditure in obtaining the business of the Buffalo General Electric Company and the International Railway Company, and probably no such claim would be made in the case of the City of Buffalo, so that really whatever expenditures have been made to build up the business have been made to obtain the general power business aggregating \$697,456 in the year 1911. This business amounted for the year ended June 30, 1906, as nearly as can be ascertained at the present time and from the data at hand, to \$238,839, so that if this figure be correct the increase from June 30, 1906, to December 31, 1911, a period of $5\frac{1}{2}$ years, was \$458,617; while upon Mr. Metcalf's theory the expense of attaching this business should be capitalized in perpetuity at upward of \$500,000, assuming of course that his theory would disregard the business of the three consumers, City of Buffalo, International Railway Company, and Buffalo General Electric Company.

Considering now the general subject of whether the company or its stockholders are entitled to any general allowance for deferred dividends to which they were reasonably entitled, expenditures made for attached business, or general promotion on account of labors, risks, and hazards incurred, the following are the considerations which appear to us to be pertinent.

No money was put into the business from the pockets of the stockholders. All of the property now owned has been procured by the use of money derived from the sale of bonds

or from income derived from operation. The growth of the business has been gradual. The report of the examiner shows that the total fixed capital June 30, 1899, was \$433,996, and at the same date the bonded indebtedness was \$425,000. In the comments made by the company upon the examiner's report, it appears that the total cost of the plant to that time was \$555,428.69. June 30, 1906, such cost of fixed capital had increased to \$1,193,110, and the growth thereafter year by year is disclosed in the table heretofore given.

As nearly as can be estimated, and upon the basis of valuation adopted in this opinion, the property, including that not in the public service, which was owned by the company December 31, 1911, had a value of \$2,768,785. Slightly different results can be obtained by using different methods, but the difference would be immaterial. The following tabulation, therefore, is substantially correct in showing what the stockholders in this company have received without the investment of any money:

Property owned December 31, 1911.....	\$2,768,785
Deduct amount amortisation reserve.....	486,499
Balance	<u>\$2,282,286</u>
Deduct bonded indebtedness	1,384,000
Net equity in property	<u>\$898,286</u>
Received in dividends to December 31, 1911.....	929,997
Total received to December 31, 1911.....	<u>\$1,828,283</u>

It is believed that the foregoing showing does not justify any further allowance for a return upon the intangibles of any nature.

Depreciation

The treatment which should be accorded to depreciation in this case demands very careful consideration, the problem being somewhat different from that of a company having a perpetual franchise. The franchise of the company was granted by the City of Buffalo in the year 1896, for a term of thirty-six years. It therefore expires in January, 1932, or

twenty years from January, 1912, from which time the calculations of this case are practically based for most purposes. The position of the City is in effect that at the end of this twenty years the franchise will be renewed by the City upon fair and equitable terms, and that therefore the question of termination of franchise may be disregarded. It contends that at the expiration of the franchise term it will be so essential to consumers to have a continuation of service that the City will be under moral necessity for affording such continuation upon such terms as will be just and reasonable to the company.

On the other hand, the respondent assumes that this position is altogether too speculative; that it is impossible to guess what may be the situation of affairs in 1932; and whether the company will be permitted to occupy the streets of the city, which occupancy, of course, is essential to its continuance in business, can not be known and therefore can not be assumed. It therefore takes the position that its property must be amortized during this period of twenty years and that disregarding this claim would be legal error.

There is also the usual disagreement as to the treatment of depreciation which is found in cases of this character. Putting the two together makes a situation of extreme complication.

Some consideration of the elementary principles involved will be useful in clearing the situation. The general principle upon which the amount of return is to be ascertained is that the entire body of customers must pay an aggregate amount equal to (a) the actual proper operating expenses, (b) a reasonable return annually for the use of the capital invested in the service of the public, and (c) an amount which is equal as nearly as can be ascertained to the average annual destruction of the property employed in the public service.

It is not advisable to discuss at this time the amount of the annual reasonable return for the use of the capital

invested in the public service. It is, however, essential to assume some rate for the purpose of definite calculations. Merely for this purpose, and nothing further, the return at this time will be assumed to be 6 per cent.

The depreciation problem arises with reference to that portion of the return which is above designated as (c), namely the amount which is equal as nearly as may be ascertained to the average annual destruction of the property employed in the public service.

There is no controversy whatsoever over the proposition that the public must pay at some time and in some form for the property which is destroyed or used in affording it the service which it receives, and there is no controversy over the fact that this return should be spread equitably over the entire life of the property. A piece of machinery is put into use in the public service and for many years is practically as good as new, but at some time it becomes worn out or obsolescent and must be thrown out of service, at which time it has no value except scrap or junk value which for the purposes of the present discussion may be disregarded. The public in whose service the machinery has been worn out must pay the company for the machinery, and the first problem is to ascertain at the commencement of the service of the machinery, if practicable, with a reasonable degree of certainty, how many years the machine would remain in service. This number of years is termed the life of the machine. Then the value of the machine must be paid by all of the public receiving the benefits of its use and destruction during the entire life of the machine. This life has to be assumed at the commencement of the term in order that those getting the benefit of the use of the machine the first year may pay their due and proper proportion, and so on during the term of life.

When such average life has been ascertained, the method of treating the depreciation so as justly and equitably to apportion it among the different consumers during the

entire life of the machine must be determined. Several methods are possible. Two have been generally regarded as best in principle and simplest in practice. These are known as the sinking fund and the straight line methods. The sinking fund method is briefly that the consumers shall pay to the company each year such a sum as will when invested at compound interest, amount, with the interest accretions, at the end of the estimated term of life of the property in service, to the amount of the investment. The straight line method is to pay to the company each year a sum equal to the amount of the investment divided by the number of years constituting the estimated term of life of the property.

The difference between the two methods is of great practical importance, and consists in this: In the sinking fund method, no part of the principal of the investment is returned to the company until the original property is taken out of service, and then the fund merely takes the place of the property thus removed because it has been worn out and destroyed by the public service.

During the term of life of the property the company gets no benefit of the annual payment made by the public. The interest accretions are added to the principal, and at the end of the estimated term the company simply has enough money to replace the property. During the entire period the company has the same amount invested or used in the public service, and therefore during the entire assumed life of the property is entitled to the same amount of annual return thereon.

In the straight line method, the average estimated annual destruction of capital is paid to the company each year, and hence the amount it has invested in the public service is constantly diminishing so far as any particular piece of property is concerned. As the amount is returned to the company, the return upon it by way of use or interest charge should of course cease. These elementary propositions, it is true, are not well understood by the public gen-

erally, and therefore a concrete illustration will probably make the matter plainer.

Assuming a piece of machinery costs the company \$20,000 and has a useful life in service of twenty years, and at the end of that term the property must be thrown out as worthless, the company is entitled to have, and the public should pay, a return of 6 per cent each year for the use of the money invested, or \$1200. It is also entitled to have its \$20,000 returned to it at the end of the twenty years. By the sinking fund method it gets the \$1200 each year for the use of its money, and also the sum which invested at say 4 per cent compounded will at the end of twenty years amount to \$20,000. This sum would be annually \$671.63. The public should therefore on this basis pay \$1871.63. Of this amount, \$1200 would be for the company's dividend and \$671.63 would go into the sinking fund; and the company would get no benefit therefrom except at the end of the term, when the entire fund would be used in replacing the destroyed piece of machinery. This method of replacing machinery makes the annual payment made by the public less each year for the destruction of capital, for the reason that the public the first year has to pay for destruction only such sum as placed at compound interest would amount to the proportion which it ought to pay of the \$20,000.

In the straight line method, theoretically, the payment by the company should change each year. The public pays one-twentieth of the depreciation, or \$1000, and also pays interest upon the amount invested. Therefore, the payment the first year would be interest \$1200, depreciation \$1000: total \$2200; but the depreciation for that year having been returned to the company by the public, the public should pay upon that no more; and therefore the second year, the company having had one-twentieth of its investment returned to it, its real investment in the public service would be only \$19,000, and the return of 6 per cent upon this would be \$1140. The entire payment for the second year would

therefore be interest \$1140, return of capital \$1000: total \$2140. The last year of the term, there being only \$1000 which remains in the public service which has not been paid for by the public, the payment would be interest \$60, destroyed capital \$1000: total \$1060. If this method is used, the company must take such measures as it deems wise to replace the machine.

The practical application of the foregoing arises in the following way: A rate case is brought at the end of say ten years, when half the term of the life of the machine has elapsed. Then one of several conditions may exist:

1. A sinking fund invested in outside securities may have been created;
2. A sinking fund invested in additions to the plant may have been created;
3. The destruction of capital fund on the straight line method may have been annually paid to the company and used for payment of dividends;
4. The destruction of capital fund on the straight line theory may have been paid and invested in additions to the plant;
5. The business may have yielded only the interest return of 6 per cent and nothing whatever for destruction of capital;
6. The business may have paid the interest return and a part only of the destruction of capital charge, which may have been treated either upon the sinking fund theory or upon the straight line method.

The question then arises, do these different situations require different treatment, and if so, will they result in different rates? An examination of the different above stated situations will disclose some interesting results.

Comparing cases 1 and 3: In case 1, it would seem that the fair return would be 6 per cent on the original investment of \$20,000 and a continuation of the annual destruction of property charge of \$671.63, making the return which

the public is to pay for these two elements \$1871.63, which is theoretically the precise return which should be paid during every year of the term of life of the machine. In case 3, after the public has paid to the company each year \$1000, being the average amount of destruction of the property, so that at the end of ten years the company has invested in the public service only \$10,000 upon which it is entitled to an annual return of 6 per cent, or \$600, together with a continuation of the annual destruction of property charge of \$1000, which would make a total for that year of \$1600.

It is clear from the foregoing that the manner in which the subject has been treated in the past is always an element of great importance in reaching the conclusion in a rate case when a portion of the life of the property has expired. If the company has consistently proceeded upon the sinking fund theory, it would be inequitable to change suddenly to the straight line method of depreciation, and vice versa. Under the sinking fund method, the public has paid for these elements of return the sum of \$1871.63 each year, and in order properly to reimburse the company this method must be continued, and to change arbitrarily to the straight line method would cut the return down to \$1600 a year, which would entail a positive loss to the company; while on the other hand, if the company has been charging the public upon the straight line method, as is seen above, the first year the public paid the sum of \$2200 and the eleventh year should pay only the sum of \$1600.

These mathematical computations need not be continued, their sole purpose in this place being to present in clear form the fact that it is impossible in a rate case equitably to adjust the matter of depreciation without considering how it has been handled by the company in the past. If it has been handled in the past upon the straight line method, a change to the sinking fund theory would obviously be unjust to the public and give greater returns to the company than it is

entitled to, because an essential element of the sinking fund theory is that the company gets no benefit from the sinking fund until the end of the term, and therefore the return upon capital must be continued upon the full amount of the investment until the term of life of the property has expired.

If the company has been charging the public in the past upon the sinking fund theory, the use which it has made of the funds collected from the public for the destruction of property introduces a new complication into the problem. If the depreciation of property fund has been invested in outside securities, which is the simplest case possible, the situation has been fairly stated. If, however, it has been invested in additions to the plant, which is a common procedure, the annual interest charge of \$1200 a year should be continued, with a charge for destruction of property made up theoretically as follows: (a) Amount of destruction, \$671.63; (b) less profits derived from the use of new property, (c) plus depreciation of the new property. These two elements, (a) and (b), introduce complications which need not be solved at this time. They are only stated in order to show that the subject in the case of a plant whose parts have different terms of life is one of extraordinary theoretical and practical complication. In fact, in the case of any given plant, the mathematical problem becomes so complicated that it would be hopeless to attempt to apply it in a manner which could be understood by the paying public, and the result would be accounting problems which are far beyond the power of all except a very few large companies whose revenues are so great as to enable them to work out all these matters at an expense which does not bear an undue ratio to the total amount of business transacted.

It may be well to point out at this place some of the results of the ordinary theory of depreciation as applied in rate cases.

Where the depreciation is deducted from the assumed cost of reproduction new of the property, the cost of reproduction

new is taken to be the amount of the original investment, and then the assumed depreciation is deducted therefrom in order to get at what is termed the actual value of the property. The question is whether this is just or unjust to the company.

Continuing the use of the figures hereinbefore taken as the basis of the illustration, we may assume that the property being investigated is a machine which costs \$20,000, and it has been in use ten years, and the rate is being established the eleventh year. The assumed term of life of the machine is twenty years, and therefore the depreciation is 50 per cent, and the value of the property in the public service is taken to be only \$10,000.

Assume that the case presented is No. 5 above stated, namely, the business for the ten years the property has been in service has only yielded the interest return of 6 per cent and nothing whatever for the destruction of capital. This is a common situation. The first ten years it may be assumed have been employed in building up the business and getting it to a point where it would pay proper returns upon the investment. It has in fact yielded only \$1200 a year, when it ought to have yielded in order to fully reimburse the owners \$1800 a year. Now, if at the end of ten years the rate making power decides that the value of the property in the public use is only \$10,000, and makes a return upon that both for use of capital and destruction of capital, the company from that time on for this particular machine gets \$600 a year for use of capital and about \$335 for destruction of capital. The clear result is that the company by this method of treatment has absolutely lost \$10,000 of its original investment without any hope of return of the same to it.

This is not a case, however, for a treatment of the subject of depreciation in all of its complications and ramifications. That subject has been so obscured by the enormous amount of discussion which has been devoted to it, and by the confusion which has arisen from an improper use of the term

"value," that it would be hopeless to attempt to present a clear and consistent theory of depreciation in all of the complicated cases which may arise. The practical question at the present time is what treatment should be accorded to depreciation in the present case, and it is probable that sufficient discussion has been given above to enable a judgment to be formed as to what should be done.

It appears from the annual reports of the company that it has been taking care of its depreciation out of the returns paid to it by the company in addition to paying its returns for the use of the capital invested. Its annual report for the year 1911 shows that it has accumulated for amortization of capital \$486,499. Practically, this may be and should be treated as a sinking fund for the amortization of its property at the end of its assumed term of life, whatever the term may be.

Having made this assumption, which is entirely justified by the history of the company and its treatment of its revenues, and by the amount of those revenues in the past, the problem is simplified very much from what it otherwise would be. We may proceed to compute the annual return for use of capital upon the basis of the amount actually invested without regard to what the actual physical deterioration is or attempting to compute what portion of the theoretical term of life of each of the constituent parts of the property has expired. Upon this assumption it is absolutely just to the public and to the company to compute the annual return for use of capital upon the basis of the investment, and so long as the company continues to give good service it will be entitled to an annual return upon that amount, because that is what it has in the business.

In like manner, we have also solved the problem of the amount upon which the depreciation for destruction of capital should be computed. We have not, however, solved the question of what should be the assumed term of life, and this brings us to the question of upon what basis the company has been computing depreciation in the past.

Respondent's Rule for "Accrued Amortization of Capital"

The Uniform System of Accounts for Electrical Corporations prescribed by this Commission provides for an account known as "General Amortization," and the rule for the same is —

Charge to this account month by month amount estimated to be necessary to cover such wear and tear and obsolescence and inadequacy as have accrued during the month in the tangible electric capital of the corporation; such portion of the life of intangible fixed capital as has expired or been consumed during the month, and the amount estimated to be necessary to provide a reserve to cover the cost of property destroyed by extraordinary casualties; less the amounts charged for that month to the various repair accounts in Electric Operating Expenses. The amount charged (or credited) to this account shall be concurrently credited (or charged) to the reserve account No. 374, Accrued Amortization of Capital.

It is further provided, that until otherwise ordered the amount estimated to be necessary to cover such wear and tear, obsolescence, and inadequacy as had accrued during any month shall be based on a rule determined by the accounting corporation. Amortization of intangible capital shall likewise be based on rule. The rule as established by the corporation is required to be filed with the Commission.

On the 28th day of December, 1908, the board of directors of the respondent, pursuant to the requirements of the Uniform System of Accounts, adopted a resolution in compliance with the order of the Commission with reference to general amortization, which reads as follows:

Resolved, That from and after January 1, 1909, there be charged monthly to an account entitled "General Amortization" (being a subdivision of the operating expenses) the amount estimated to be necessary to cover ordinary wear and tear of the company's plant and property during the month, and in addition thereto, in respect of obsolescence and inadequacy and amortization of intangible capital (other than ordinary wear and tear of the company's plants and properties) such sum as will make the aggregate of such monthly charges at the date of the expiration of the company's franchise, January 14, 1932, equal the amount of the company's capital stock and outstanding debt at that time, in excess of the estimated value of its tangible property

without the franchise; less, however, the amounts charged for the month to the various repair accounts in operating expenses. The net amount charged (or credited) to this account shall be credited (or charged) concurrently to a reserve account entitled "Accrued Amortization of Capital".

It will be noted that this rule provides for the amortization of the capital stock of the company amounting to \$2,000,000, and the outstanding debts January 14, 1932, in excess of the estimated value of the tangible property of the company without the franchise. No rule is provided for determining the estimated value of the property in 1932 without the franchise, but the assumption is justified that what was intended by the company was the scrap value at that time. The capital stock amounts to \$2,000,000 and the outstanding bond indebtedness is \$1,384,000. Thus the rule contemplates an amortization of \$3,384,000 less scrap value of the tangible property.

Pursuant to this rule, in the year 1911 the company charged to account 842, General Amortization, \$123,209.50. After making all proper adjustments, the result was that the capital account, Accrued Amortization of Capital, which stood at \$372,370.86 December 31, 1910, was increased to \$486,499.16 December 31, 1911: an increase for the year of \$114,128.30. Increasing the reserve each year by this amount and compounding the same at 4 per cent, the reserve in twenty years would amount to very nearly \$3,400,000.

It should not be overlooked that in addition to this increase in amortization reserve the company increased its corporate surplus during the year 1911 \$201,108.07, in addition to paying a 6 per cent dividend upon \$2,000,000 capital stock amounting to \$120,000.

It having been hereinbefore found that the so called intangibles represented by the capital stock of \$2,000,000 are no part of the capital of the company, either tangible or intangible, it follows that a disposition of this amortization fund must be made; and a practical solution of the question which seems the most just to all parties is to treat the accrued amor-

tization of capital which amounted to \$486,499.16 December 31, 1911, as invested upon the sinking fund theory. Upon this treatment, and assuming a 4 per cent return, this fund would amount at the end of twenty years, January 14, 1932, to \$1,065,968, leaving to be amortized in the future the difference between the existing capital as hereinafter found and this sum of \$1,065,968. It may be observed, however, that the amount which is to be amortized of the present capital of the company, both tangible and intangible, after making all suitable deductions for scrap values and property which is not subject to amortization, amounts to \$1,760,663, leaving a net amount to be provided for of \$694,695, which would require an annual payment into the sinking fund of \$23,342.

Certain Items of Capital Not Hereinbefore Discussed

The land owned by the respondent consists of five distinct parcels, which are carried upon its books at \$54,601.45, this being their cost. This is the sum at which they are carried in the examiner's report. Land has a value for other purposes than that of carrying on the proper business of the company. It could be retired from the service at any time at its market value for such other purposes. This fact differentiates it from property which is valuable only for company operations, and it has been universally held that a company is entitled to a just and reasonable return upon the present value or market value of the land used by it in the public service. It is clearly distinguishable in principle from those things which have no value except in the service of the company, except scrap value. It is conceded by the City that the land owned by the company has a greater value than the cost. The market value, however, is in dispute. Each party called but one witness upon this point. On the part of the City, the witness Parke places the value of the land at \$61,162; and on the part of the company, the witness Mahoney places the value at \$102,655: a difference of \$41,493. We have nothing before us to show the value of these

parcels of land except (a) the aggregate cost as carried on the books; (b) the opinion of the witness Parke; (c) the opinion of the witness Mahoney; and (d) the evidence of the witness Mahoney as to the increase of land values in the neighborhood of each parcel during the past ten years or thereabouts.

The aggregate valuation given by the witness Mahoney is 88 per cent greater than the cost price. The aggregate valuation of the witness Parke is about 12 per cent above the cost price. The witness Mahoney on cross-examination gave the general percentage of increase in value in the vicinity of each parcel. If the present value is \$102,655, as claimed by him, and if the rise in values has been according to the percentages claimed by him, the land ten years ago would have cost about \$75,000 instead of its actual cost of \$54,000. The average increase in the period named as given by Mahoney is about 37 per cent. Applying this increase to the actual cash cost, the present market value of all the parcels would be about \$75,000, while Parke's estimate is as above stated, \$61,000.

There is nothing satisfactory in the nature of the evidence upon these matters, but there are some indications that the witness Parke has placed the value of some of these parcels too low; and it is reasonably certain from Mahoney's own evidence that he has placed the values too high. Taking into consideration the actual cost price and the probable increase in values, it is reasonable to assume that \$75,000 is about the present fair market value of these parcels.

The respondent gave proof, which was undisputed, that on December 31, 1911, it had work in process for capital additions to its property amounting to \$106,181.68. Near the close of the case it offered further evidence concerning the additions to capital in 1912, showing that it had completed work in 1912 amounting to \$147,167.88, had further work in process amounting to \$94,183.70, and had retired during the year property to the amount of \$264.57. The

sum of these matters is \$241,087.01, and deducting of course therefrom the amount of capital orders in process December 31, 1911, we have left a total of \$134,905.33 as the capital additions made in 1912 and the work in process up to October 31, 1912. The City objected to the reception of this last evidence, and claimed that the whole case should stand upon the basis of the property in use or in process December 31, 1911.

It seems unobjectionable, however, to add to the property of the company this sum of \$134,905.33, since it is property which would be in the service of the public upon the rate which is to be established by the decision of the Commission, and it should certainly earn a return thereon. The adjustments which would have to be made in considering the earnings and operating expenses of 1912 are not important in the final result. Therefore, this sum of \$134,905.33 should be taken as a part of the property of the company.

There is considerable dispute between the parties as to the amount of working capital actually used in the business of the company. One witness for the company places the amount at \$175,000, and the secretary of the company places it at \$200,000. The City places it at less than \$100,000. Considerable discussion was had during the hearings as to the proper method of determining working capital. Brief comment only is needed at this time.

It is obvious that the company during a given month—for example, January—incurs certain expenses. Bills to its customers for current furnished are presumably not rendered until the close of the month, and then a reasonable number of days is allowed for payment, so that its earnings for the month of January are not collected until some time in the month of February. If the company desires promptly to pay all its January bills at the close of the month, it needs a certain amount of cash on hand for that purpose, which properly may be termed working capital, and the amount needed is obviously only one-twelfth of the entire expenses of this

character for one year, upon the assumption that the expenses are evenly distributed through the year by months. This in the main is a fair assumption, the great expense of the company being for current, and the other expenses which require cash payments at the close of the month being relatively inconsiderable. What is the practice of the company in paying for current is not disclosed by the evidence. A careful examination of the contract between it and The Niagara Falls Power Company shows that it is very doubtful if the company is under any legal liability to pay for current for one month until after the middle of the following month, at which time it would have sufficient funds on hand from payments made by its customers to pay the January bill.

Such expenses, however, may not be all of the purposes for which working capital is required. Such capital may be needed to some extent for the purpose of additions and betterments to fixed capital. Of course these could be financed in another way by borrowing the money from the bank and then adding the interest to the cost of the fixed capital.

It must be said that the evidence upon the amount of working capital actually employed by the company in its business, and which will necessarily continue to be employed during the time in which the rates can be established by this Commission, is unsatisfactory and insufficient. It does not afford data sufficient to enable an accurate determination to be made. The company has plenty of money on hand which can be called working capital or not, at its pleasure. It would not be harmed in the slightest if the amount is somewhat underestimated, as a few brief calculations would show. An overestimate of the amount fixes upon the public a 6 per cent charge for the overestimate, and this of course should be avoided. Under all of the circumstances of the case, it is believed that \$80,000 is an ample allowance for this item.

Materials and supplies on hand are concededly a part of the invested capital of the company used in the public service. The company inventories its materials and supplies on

hand December 31, 1911, at the amount of \$40,180. This does not appear to be disputed by the City, and may be assumed to be correct.

Operating Expenses

We discover no serious criticism made by the City upon any of the operating expenses of the respondent other than the cost of power and the charge for general amortization.

As hereinbefore explained, the respondent purchases all of the electric energy supplied by it from The Niagara Falls Power Company or the Canadian Niagara Power Company, a subsidiary of The Niagara Falls Power Company. This purchase is made pursuant to the terms of the contract with Franklin D. Locke, hereinbefore described, and several agreements supplemental thereto. Under these several agreements the respondent is paying for electric energy delivered to it at the city line of Buffalo, substantially \$16 a year for each electric horsepower delivered, the measurement being made upon what is technically known as the peak of the load. During the year 1911 it purchased approximately 230,992,278 kilowatt-hours, for which it paid the sum of \$820,093.78. Its total sales during the year were 213,025,815 kilowatt-hours. It used for its own purposes 2,097,579 kilowatt-hours, leaving approximately 15,868,883 kilowatt-hours unaccounted for, an amount of unaccounted for current which has not been criticised in any way as being unreasonable.

The sales of current to corporations were chiefly to the International Railway Company and to the Buffalo General Electric Company. The sales to the International Railway Company amounted to 79,955,000 kilowatt-hours, and to the Buffalo General Electric Company 40,026,439 kilowatt-hours. Comparatively inconsiderable amounts were sold to other railroad corporations. The sales to the International Railway Company amounted to \$419,579.59, and to the Buffalo General Electric Company to \$319,322.44. The general character of the service is indicated by the following tabula-

tion of quantity of current sold to various classes of customers, stated in kilowatt-hours:

Municipal service	17,187,183
Private consumers	74,060,377
Railroad corporations	81,761,816
Other electrical corporations	40,026,439
Total	213,025,815

The average net price paid by the respondent for current per kilowatt-hour was 3.1 mills, delivered as above stated at the city line of Buffalo.

A large amount of evidence was introduced by the City concerning sales of electric energy generated at Niagara Falls by other companies and the price realized therefrom, especially the sales by the Ontario Power Company to the Hydro-Electric Commission of the Province of Ontario. There was also evidence given concerning the price charged by the Cliff Electrical Distributing Company of Niagara Falls, as well as some evidence concerning prices elsewhere. The object of this evidence was understood to be to show that the price paid by the respondent to The Niagara Falls Power Company for electric energy was excessive, and that the price paid to the respondent by its consumers should not be governed by the price paid by the respondent for the current but rather by what it ought to pay under all the circumstances of the case.

The Commission has considered with care all of the evidence pertaining to the question as last stated, and finds itself unable to agree with the contention of the City in this respect, and a brief statement of the reason of its disagreement will at this time be appropriate.

The respondent is taking current under a contract which was executed in the year 1896, and by its terms, as interpreted by subsequent modifications, is to continue in force during the term of the corporate existence of The Niagara Falls Power Company. It has not been suggested that this contract was unlawful in its inception or that it was or it is void. It has not been made to appear how The Cataract Power and Conduit Company can become released from its

terms. That company has no other source of supply for electric energy, and if unable to procure the current under that contract would be compelled, if it furnished current at all, to erect a steam plant, it not appearing that there is any source open to it for obtaining hydro-electric current other than its contract with The Niagara Falls Power Company.

Assuming for the moment, and merely for the sake of the argument, that The Niagara Falls Power Company under the terms of that contract is receiving an excessive price for its current, it must be kept in mind that that corporation is not a party to this proceeding, and the rate which it charges The Cataract Power and Conduit Company is not in question directly. The only rates which are in question and which are complained of are the rates charged by The Cataract Power and Conduit Company to its customers, and the contention is that the rate to them is excessive because of an excessive price paid by it for its energy. It is not claimed that The Cataract Power and Conduit Company can procure energy from any other source at the present time at less than \$16 for each electric horsepower. It appears quite clearly from the evidence that as matters now stand there is no source of hydro-electric energy open to the respondent other than The Niagara Falls Power Company. The Ontario Power Company's production is sold out. There is no direct proof before the Commission as to the unsold capacity of the third generating plant at Niagara Falls, commonly known as the MacKenzie plant, but the Commission understands, outside of the record, that the unsold capacity of that plant is not to exceed 46,000 horsepower, while the Cataract at the present time is taking upward of 60,000 horsepower. The situation with regard to generating electric energy at Niagara Falls is at the present time somewhat unsettled, owing to the expiration of the Burton law and other matters which need not be discussed in detail at this time.

It is quite clear that if the Commission should fix a rate which might be charged by the respondent without regard

to the price paid by it for current to The Niagara Falls Power Company, the consequences might be extremely disastrous to it as well as to its customers. It is not apparent how The Niagara Falls Power Company could be required to furnish current to the Cataract company by reason of anything contained in this proceeding except under the existing contract, and the question whether that contract can be disregarded is one which this Commission should not be asked to pass upon in this proceeding, under all of the circumstances of the case.

Assuming, however, that the Commission has power to disregard the contract, there would arise a further question whether it ought to be disregarded, and it would seem to be elementary that before this Commission could pass upon the question of whether the price of The Niagara Falls Power Company is excessive or not, that company should be heard and an examination into all its affairs and history, detailed and exhaustive, should be made. There has been no evidence adduced before this Commission which is sufficient to enable it properly to judge whether the price paid by the Cataract company is unreasonable or otherwise.

It is clear that, upon the assumption that such price is a reasonable price, there can be a substantial reduction made by the respondent to its customers, and the benefit of that reduction should not be denied them in the effort to get something more which is uncertain, and the effort to obtain which would certainly entail long and disastrous litigation, to say the least.

Considering all of the matters hereinbefore briefly referred to, the Commission is of the opinion that the part of wisdom demands that for the purposes of this proceeding at this time it be assumed that the price paid for current by the respondent is not open to question, and this without deciding or intimating whether it ought to be or may be questioned in the future in an appropriate proceeding. In fact, its decision upon this latter point could have no binding force, but it

should be plainly understood that the decision of the Commission not to enter into the question of that price at this time is dictated by the consideration that the opposite course would be unwise and unreasonable.

General Amortization

The subject of general amortization has been necessarily discussed somewhat fully under the head of depreciation, of which it is essentially a part. It appears from that discussion that the company has been handling its amortization upon the theory that the term of life to be reckoned with was the term of its franchise, which expires January 14, 1932. It has collected a large sum of money from the public upon that theory, which sum, if properly invested, will amount at the end of the term to upward of \$1,000,000. It may also be assumed that the company has practically proceeded upon the theory of a sinking fund invested in outside securities. In fact, a very considerable amount is actually thus invested. If it should be assumed that the sinking fund has been created by investments in additions to the plant, the company would not be entitled to earn any returns upon that investment by way of dividends without making a deduction from the amount of the original investment equal to the amount of the fund upon which such returns were made. Otherwise there would be a duplication of returns wholly unjust. Since practically the company should be allowed to earn returns upon the investment value of all its property in the public service irrespective of the source from which the money was derived, we are compelled to adhere to the theory of the sinking fund invested in outside securities.

Deducting from the total investment value of the property in service the value of the land as non-depreciable, the working capital, the materials and supplies, and making proper allowance for the scrap value of the depreciable property, the Commission finds that the total depreciable property amounts to \$1,760,663. The sinking fund already provided will take care of \$1,065,968 of this. Hence there is depreciable property to the amount of \$694,695 which should be

amortized during the twenty years of the franchise term remaining unexpired January 14, 1912.

The adoption of this period of life during which the depreciable property is to be amortized will produce some results which should not be overlooked, the first of which is that it is believed to be more favorable to the consumer at the present time than would be found if the ordinary theory of prospective life under an unlimited franchise were adopted.

Interesting questions, however, will arise at the expiration of the franchise. The company will then be the owner of what will undoubtedly be a well equipped plant in excellent operating condition which has been fully amortized: that is, has been fully paid for by the public. The company, however, will be the owner of the plant, and not the public; and if the franchise should be renewed it would be incumbent upon those in authority at that time charged with the duty of fixing the rate properly to adjust the equities as between the company and the public. In the rate which should be established at that time there can not properly be any allowance made for the amortization or wearing out of the then existing plant. The rate would necessarily be wholly confined to the return for the use of capital invested. This fact will necessitate very careful accounting methods on the part of the company and a full appreciation by the public in 1932, if the franchise should be renewed, that no element of amortization or paying for the wearing out of the existing plant can properly enter into the rate so long as the then existing plant is continued in service. When it shall have been replaced, another question will present itself for solution.

It is the clear duty of the authorities of the City of Buffalo to make such record of this fact that it will not be overlooked or forgotten at that time.

Contract with International Railway Company

The respondent is supplying energy to the International Railway Company to a very large amount each year. As

shown above, the International Railway Company is by far its largest customer, the sales to it in the year 1911 amounting to \$419,579.59, being in excess of 25 per cent of the total earnings from operation. The energy so supplied is bought by the International Railway Company under a contract which by its terms continues to 1932. The International Railway Company is not complaining of the rate, has not invoked the power of this Commission, and it is doubtful if it could invoke such power, in view of the fact that it has voluntarily entered into a contract which does not expire for nearly twenty years. No one has suggested to the Commission how it acquires power to abrogate, annul, or set aside this contract, in any manner. It has not been pointed out that it was illegal in its inception; and if we were to assume that it would be possible for the Commission to disregard it, it would seem to be wise to exercise that power only upon the complaint of the aggrieved party, namely the International Railway Company, which is not before us. It may be better satisfied with the contract at the present rate in view of the fact that it has a contract with a responsible corporation to supply it for twenty years at that rate than it would be at a lower rate with only from year to year supply guaranteed. Having in mind these very obvious considerations, it does not appear to the Commission that it has any power to interfere with the rate charged the International Railway Company upon the ground that it is unreasonable. If it were justly or unjustly discriminatory as against other customers, another question would be presented; but that question is not before us now, since no one has claimed that the contract is susceptible to that charge. For these reasons no attempt will be made to change the rate charged the International Railway Company.

Our attention has not been called to any other contract standing in like position. If there is such a contract outstanding, the fact that it is not recognized in the decision may require a modification of that decision or further con-

sideration. This is said merely by way of precaution and in the belief that there is no such contract.

General Summary

As a conclusion from the foregoing discussion, we find that the fair value of the property of the respondent company used in the public service is the sum of \$2,287,582, including herein the present exchange value of the land owned by the company in the public service, and also the additions to capital made in 1912.

Upon this basis, we find that rates of the company should be reduced 28 per cent, with the exception of those charged the International Railway Company. The effect of this reduction is shown in the following table:

Operating Revenues:

	Earnings 1911	Reduced to	Amount reduction	Per cent reduction
Lighting municipal buildings . . .	\$401.51	\$289.08	\$112.43	28
Municipal power	78,213.74	55,713.36	22,500.38	28
Commercial metered lighting	20,352.81	14,654.02	5,698.79	28
Commercial metered power	677,103.07	487,514.16	189,588.91	28
Buffalo General Electric Co.	319,322.44	229,911.84	89,410.60	28
Total of above	\$1,095,393.57	\$788,082.46	\$307,311.11	
International Railway Co.	419,579.59	419,579.59		
Miscellaneous	1,126.92	1,126.92		
Total operating revenues	\$1,516,100.08	\$1,208,788.97		
Reduced to	1,208,788.97			
Reduction	\$307,311.11			

As is disclosed by this table, if applied for the year 1911, the operating revenues would have been reduced to \$1,208,788.97. The deductions from these operating revenues for the same period, which the Commission considers should be made, are shown as follows:

Deductions from earnings:

Operating expenses, less amortization	\$962,455
Taxes	67,247
Uncollectible bills	50
Obsolescence and inadequacy	15,000
Contingencies	10,000
Amortization	23,444
Total deductions	\$1,078,196

Total reduced revenues.....	\$1,208,788
Total deductions	1,078,196
Leaving for returns on capital.....	\$130,592

It should be clearly understood, that in reaching these results the Commission does not undertake to fix a precise rate of return upon the capital invested in the public service. Nominally, the return here shown is approximately 6 per cent. Applying the rate as reduced to the business of the future, there is not the slightest question but that it will amount to considerably more than this. No one can tell what it will be until the rate has been tried out. The Commission simply satisfied itself that the proposed reduction would not reduce the revenue below a 6 per cent return, while it seems almost equally certain that the rate will be considerably above that.

As to the manner in which the reductions should be made, it would seem from such examination as has been given the subject that the present schedule of rates of the company is probably as nearly equitably adjusted between the consumers as can be done with the information at hand. A careful study of the matter has been made, and no better method of changing the rate has suggested itself than by making a percentage reduction from the existing rates, and it is understood that the company acquiesces in this method. This, of course, is not to be taken as a statement that the company acquiesces in a reduction, but simply that if a reduction is to be made, this is the proper way of doing it.

Further details will be settled in the order.

**In the Matter of the Complaint of LOUIS P. FUHRMANN AS
MAYOR OF THE CITY OF BUFFALO *against* BUFFALO GEN-
ERAL ELECTRIC COMPANY.**

Buffalo General Electric Company distributes and sells electric energy in the city of Buffalo. It purchases this energy within the limits of the city principally from The Cataract Power and Conduit Company, the price paid said company being \$25 each electric horsepower. The mayor of the City made complaint that the prices charged by said company were unjust and unreasonable. After answer and hearing, the Commission finds that the general level of the rates of the company should be reduced an average of 25 per cent, with a change in form of the sliding scales used by the company in its schedules.

The opinion contains discussions of the following subjects:

(a) Fair value of the property of the company used in the service of the public.

(b) Whether the franchise of the company to occupy the streets of Buffalo constitutes property upon which it is entitled to a return from its customers, including the City of Buffalo.

(c) About the time of the formation of the company it entered into a contract with the General Electric Company of Schenectady, and as a consideration to said General Electric Company of Schenectady for entering into said contract there was issued to it stock to the amount of \$600,000 and bonds to the amount of \$100,000. The company claims in effect that a return of some amount should be allowed in the rate because of the existence of this stock and bonds. The Commission in discussing this question considers the status of investors in the stocks and bonds of public service corporations.

(d) "Going concern" value.

(e) The company claims that a certain contract which it has for power with The Cataract Power and Conduit Company has a property value upon which it is entitled to returns. The Commission holds otherwise.

(f) Returns to be allowed upon a building partly used for the purposes of the company and partly for rental.

(g) Whether the unaccounted for energy is excessive and unreasonable.

(h) The principles upon which a rate schedule for electrical corporations should be constructed.

Decided April 2, 1913.

Clark H. Hammond, Corporation Counsel, *Harry D. Sanders*, Assistant City Attorney, for complainant.

Kenefick, Cooke, Mitchell & Bass for respondent.

STEVENS, Chairman:

At the outset of the case against the Buffalo General Electric Company, it is well to observe that many of the most important questions arising in it have been fully discussed in the case against The Cataract Power and Conduit Company, and therefore as to these it will only be necessary to refer to such discussion and to state the conclusions reached in the case of the General Electric.

It is also probably advisable to state at this time the stockholding relationships existing between the two companies, since undoubtedly there has been some misapprehension as to this point in the minds of the public.

The capital stock of The Cataract Power and Conduit Company consists of 20,000 shares of the par value of \$2,000,000. Of this stock, 10,200 shares of the par value of \$1,020,000, a majority control, are owned by The Niagara Falls Power Company. Approximately 67 stockholders of the Buffalo General Electric Company own stock in the Cataract company. The amount so owned is approximately 7112 shares of a par value of \$711,200, being approximately 35 per cent of the entire stock of the Cataract company. There are 122 stockholders of the Cataract company.

The stock of the Buffalo General Electric Company consists of 37,240 shares of the par value of \$3,724,000, owned by 415 stockholders. Approximately 67 stockholders of the Cataract company own 10,026 shares of the stock of the Buffalo General Electric Company, of a par value of \$1,002,600, being 26.9 per cent of the entire stock of this company. To state the matter in another way, stockholders having holdings in both companies own 35 per cent of the stock of the Cataract company and 26.9 per cent of the stock of the General Electric company. It does not appear of

record that The Niagara Falls Power Company, either directly or indirectly, has any stockholdings in the General Electric. Whether it really owns stock standing in the name of private individuals is not known to the Commission. There is nothing in the list of stockholders which indicates that such is the case.

Buffalo General Electric Company was incorporated August 19, 1892, such incorporation purporting to be a consolidation of two then existing electrical corporations, namely, the Brush Electric Light Company of Buffalo and the Thomson-Houston Electric Light and Power Company of Buffalo. The capitalization of these two constituent companies has not been ascertained nor is it particularly material.

The so called consolidation agreement was in effect practically a purchase of the fixed capital and franchises of the consolidating companies, there being excepted from the consolidation the property of the consolidating companies consisting of cash, accounts receivable, supplies, and materials. By the agreement, stock and bonds were to be issued to named amounts and turned over to the stockholders of the constituent companies in payment for the plants and franchises, all to be free of liens and incumbrances except that the Thomson-Houston property was to remain subject to the lien of certain bonds secured by mortgage to the amount of \$600,000. The following tabulation shows the amounts issued to each company:

	<i>Stock</i>	<i>Bonds</i>
Brush company	\$800,000	\$900,000
Thomson-Houston company	500,000	200,000
Thomson-Houston underlying bonds		600,000
Totals	\$1,800,000	\$1,700,000

The total of stock and bonds issued for the property of the two companies as shown by this tabulation was \$3,000,000. The question is presented, what was the fair value or amount of the physical property? In the reports of the company to the former Commission of Gas and Elec-

tricity for the years ended June 30, 1906, and June 30, 1907, this value is stated to be \$900,000. Obviously this was but a mere estimate, and no particular reliance can be placed upon it.

During the progress of the examination by the Commission into the actual cost of the physical properties of the company, which is hereinafter detailed, an elaborate and exhaustive inquiry was made into the cost or investment value of the physical property taken over by the company in 1892 from the constituent companies. The results of the examination were included in the examiner's report served upon the company, and in its comments upon such report the company does not question the substantial correctness of the conclusions reached. The following is a summary of the estimate:

Land	\$153,993.00
Buildings	167,696.00
General structures	9,368.00
Furnaces, boilers, and accessories	64,789.00
Steam engines	92,328.00
Electric generators and accessory electric power equipment ..	246,303.25
Miscellaneous power plant equipment	85,800.00
Poles and fixtures	74,154.43
Underground conduit	45,845.00
Steam mains	2,500.00
Distribution system, underground	8,224.54
Distribution system, overhead	49,041.87
Arc lamps	96,701.50
Line transformers and devices	16,500.00
Meters	4,793.05
Electrical laboratory equipment	76.00
Total	\$1,118,113.64

Following the foregoing summary in the report are upward of twenty pages of details, going with great elaboration into the items of the property and the cost of such items. In the preparation of these schedules every available assistance was rendered by employees of the company who were in full touch with the investigations being made; and considering the circumstances of the investigation and the care exercised in making it, it is believed that the total value assigned to the physical capital as of August 1, 1892, of \$1,118,113, does not err upon the side of being too little.

In addition to stock and bonds to the amount of \$3,000,000 issued in the manner above detailed at the time of

the consolidation, shortly after the consolidation the respondent issued to the General Electric Company of Schenectady stock to the amount of \$600,000 and bonds to the amount of \$100,000. On the date of the execution of the consolidation agreement, July 27, 1892, the General Electric Company of Schenectady entered into a written agreement with the individuals named in the articles of consolidation as the directors of the Buffalo General Electric Company, in and by which the said directors agreed that upon the formation of the Buffalo General Electric Company by consolidation, they would "cause the Buffalo company to execute on its part and deliver to the General company the form of contract hereto annexed marked 'D,' and also cause that company to deliver to the General company in payment for the license, rights, and privileges conferred by said contract, shares of the capital stock of the Buffalo company amounting at par to \$600,000 and 6 per cent bonds of the company amounting at par to \$100,000, said bonds to be a portion of those provided by said consolidation agreement to be issued by the new company".

The consolidation agreement contained the following clause: "There shall be issued by said new consolidated company by direction of its board of directors \$600,000 of capital stock and \$100,000 of said authorized bonds for the purpose of purchasing additional rights, privileges or franchises for the use and benefit of said consolidated corporation."

Under and pursuant to the authority conferred by the clause last quoted from the articles of consolidation, the Buffalo General Electric Company did issue the stock and bonds to the amounts named, and did execute the contract with the General Electric Company of Schenectady known as form "D," said contract being dated the 15th day of October, 1892. There was no consideration received by the Buffalo General Electric Company for the issue and delivery of stock to the amount of \$600,000 and bonds to the amount

of \$100,000, except the execution and delivery by the General Electric Company of Schenectady of said contract, form "D".

It would seem from the foregoing that the respondent commenced operations in the year 1892, with a total capitalization of \$3,700,000, consisting of stock \$1,900,000 and bonds \$1,800,000.

The subsequent history of the capitalization of the company is as follows: About September, 1904, the respondent purchased 5000 shares of Buffalo and Niagara Falls Electric Light and Power Company stock of the par value of \$500,000, and issued in payment therefore its common stock to the amount of \$614,000 and its bonds to the amount of \$200,000. The annual report of respondent for the year 1911 states that stock to the amount of \$275,000 was sold for cash, but does not state the amount of cash received; and also states that stock to the amount of \$935,000 was issued as stock dividends. The following, therefore, is a summary of the purposes for which the capital stock of the company has been issued:

For property of Brush Electric Light Company.....	\$800,000
For property of Thomson-Houston company.....	500,000
For agreement with General Electric Company.....	600,000
For stock of Buffalo and Niagara Falls Electric Light and Power Company	614,000
For stock dividends	935,000
For cash (amount unknown).....	275,000
Total	\$3,724,000

The total amount of funded debt of the company as of December 31, 1911, consisted of 5 per cent bonds of the par value of \$3,188,000. The purposes for which said bonds were issued were as follows:

To stockholders of Brush Electric Light Company.....	\$800,000
To stockholders of Thomson-Houston company.....	200,000
To refund underlying bonds Thomson-Houston company.....	600,000
To General Electric Company of Schenectady.....	100,000
Part payment of stock of Buffalo and Niagara Falls Electric Light Company	200,000
Sold for cash	316,000
For construction of new building authorized by this Commission	570,000
For construction authorized by this Commission.....	243,000
Unaccounted for	59,000
Total	\$3,188,000

It will be noted that \$59,000 is unaccounted for in the foregoing tabulation. The Commission has not learned for what purposes bonds to this amount were issued.

In the annual report of the company for 1911 it is stated at page 210:—" \$1,859,000 was issued at time of organization for property, franchises, etc., of Brush Electric Light Company and Thomson-Houston Electric Light and Power Company." It would seem that bonds to this amount were issued, therefore, for some purpose connected with the original organization. The total capitalization of the company therefore is:

Stock	\$3,724,000
Bonds	8,188,000
Total	<u>\$6,912,000</u>

all of which has been issued for the purposes hereinbefore stated.

Claimed Value of the Property in Service

As we understand the brief of the City, it is therein claimed that the total fair value of all of the property employed by the respondent in the public service is the sum of \$1,850,407, upon which it is contended the respondent is entitled to a return of 6 per cent, and in addition thereto annually the sum of \$71,637.34 for amortization.

On the other hand, upon the basis of reproduction new the respondent claims the following as the fair value of its property in service:

Reproduction value new	\$4,707,011
Additions to fixed capital in 1912	259,129
Going value	<u>1,200,000</u>
Total	<u>\$6,166,140</u>

Upon this sum it thinks it is entitled to a return of 8 per cent per annum.

The difference between the two estimates as to the value of the property in service is \$4,315,733.

The following table is a summary of the reproduction cost new estimates of the parties. It should be observed that in the total of the estimate of the City shown in this table there is no allowance for depreciation.

Item	Company (Jackson)	City	Difference	Excess of larger estimate over smaller, per cent
Labor and materials costs:				
Land.....	\$244,993	\$171,000	\$73,993	43
General structures.....	37,718	28,798	8,920	31
General equipment.....	32,196	12,937	19,259	149
Sub-station buildings.....	61,096	46,357	14,738	32
Sub-station equipment.....	593,100	1 498,077	95,023	19
Poles and fixtures.....	233,577	246,970	13,393	6
Underground conduits and laterals.....	290,338	1 292,788	2,450	1
Overhead wire:				
Overhead distrib'n system. \$226,835				
Overhead services..... 32,866				
	259,701	220,816	38,885	18
Underground cable:				
Underground distrib'n system \$239,198				
Underground services..... 15,165				
	254,363	1 209,474	46,889	23
Line transformers and devices.....	267,880	255,715	12,165	5
Meters installed.....	206,776	172,546	34,229	20
Arc lamps, municipal..... \$90,947				
Arc lamps, commercial..... 24,471				
	115,418	96,240	19,178	20
Electric tools and implements.....	939	416	523	126
Electrical laboratory equipment.....	7,636	3,610	4,026	111
Advertising sign.....	438	438	.....	.....
Total fixed capital.....	\$2,606,167	\$2,254,182	\$351,985	16
Materials and supplies.....	50,065	.....	.....	.....
Meters, etc., in stock.....	27,471	.....	.....	.....
Operating capital.....	245,000	63,011	181,989	288
Construction work in progress.....	1 478,290	136,220	342,070	251
Total labor and materials costs.....	\$3,406,993	\$2,453,413	\$953,580	39
Various overhead percentages.....	1,300,018	.....	.....	.....
Final grand total.....	\$4,707,011	\$2,453,413	\$2,253,598	92

1 Does not include storage batteries.

2 Phelps.

3 Includes Genesee Street building.

Fair Value of the Property in the Public Service

This case was tried by both parties upon the theory that the fair value was to be determined primarily by the cost of reproduction new. No other course was open to the City, it having no means of determining the actual investment made by the company in its property. It was made of choice by the company, which did not seek to show to the Commission how much had been actually invested by it in its plant.

As in the Cataract case, the Commission was not satisfied with the situation, and finding that the cost to the company could be ascertained with reasonable exactness by an examination of its books and records, it directed such an

examination to be undertaken by its own examiners and engineers. The result of this examination was an exceedingly voluminous report of nearly two hundred pages. This report was submitted to both the City and the company for consideration, and after such consideration was introduced in evidence as a part of the record upon which the Commission was to make its determination. The City has made no comments thereon and offered no suggestions. The company has submitted such criticisms as it thought proper, which will be hereinafter fully considered.

The Commission has made a careful study of the report of its examiners and engineers in the light of the criticisms and suggestions offered by the company, and it believes that with some corrections to be hereafter noted, the results shown by the report should be accepted as the chief basis to work from in reaching a determination as to the fair value of the property in service. The reasons for this conclusion are substantially the same as those set forth in the Cataract case, and need not be repeated at this time. In reaching this conclusion we have carefully considered and weighed all the matters enumerated in *Smyth vs. Ames* as the basis for fixing the fair value, and indeed all others which have been suggested by counsel on either side, and have given them such weight respectively as we think they are entitled to have. We recognize valuations can not be made upon a universal and inflexible rule. In all cases the end to be attained is the same, but different roads may be traveled to reach it.

The cost of reproduction new theory, as it is applied at the present time, does not meet the approval of the Commission as controlling in this case. There is altogether too much uncertainty as to the result and too much difference of opinion as to the bases upon which the result must be founded. It is unnecessary at this time to repeat all of the illustrations of this truth which are to be found in the opinion of this Commission in the case of the Buffalo Gas Company and in the case of the Cataract company. One or two illustrations of

how the theory would work out in this case, however, are subjects of proper consideration.

The chief witness for the company prepared a table showing the valuation of the entire physical property of the company and how it was built up. This table is printed as a part of the company's brief, and in order to present fairly the company's view, it is herewith reproduced, and the following is such table:

FUHRMANN v. BUFFALO GENERAL ELECTRIC CO. 749

21. III.

Estimate of cost of reproducing physical property of Buffalo General Electric Company, incorporated as of December 31, 1922.

Kind of plant	Labor and materials	Add for engineering and supervision, %	Making	Add for general incidentals, %	Making	Add for insurance during construction, %	Making	Add for organization of business, %	Making	Add for taxes and interest during construction, %	Totals
Land	\$244,993	5	\$257,243	...	\$257,243	...	\$257,243	6	\$272,677	12	\$305,398
General structures	37,718	10	41,490	...	41,490	...	41,490	6	44,168	8	47,701
General equipment	32,196	5	33,806	...	33,806	...	33,806	6	35,824	4	37,987
Sub-station buildings	81,095	10	87,205	...	87,205	...	87,205	6	91,544	8	97,987
Sub-station equipment	593,109	10	652,410	2	655,438	...	655,438	6	705,706	8	763,240
Poles and fixtures	293,877	10	325,835	2	328,012	...	328,012	6	343,613	8	369,422
Underground conduits and laterals	290,338	10	319,872	1.5	324,163	...	324,163	6	343,613	8	371,102
Distribution system:											
(a) Overhead	226,835	10	249,510	2	254,508	...	254,508	6	271,938	8	293,893
(b) Underground	239,198	10	263,118	1	265,749	...	265,749	6	283,947	8	306,862
Line transformers and devices	267,880	10	294,668	2	300,561	...	300,561	6	321,143	8	346,534
Electric services:											
(a) Overhead	32,866	10	36,153	2	36,876	...	36,876	6	39,401	8	42,553
(b) Underground (excl. conduit)	19,165	10	20,881	1.5	21,631	...	21,631	6	23,090	8	24,537
Electric meters and installation	206,775	5	217,114	...	217,114	...	217,114	6	230,347	8	239,347
Are lamps in place:											
(a) Municipal	90,947	5	95,494	...	95,494	...	95,494	6	101,224	4	105,273
(b) Commercial	24,471	5	25,695	...	25,695	...	25,695	6	27,237	4	28,326
Electric tools and implements	939	5	986	...	986	...	986	6	1,045	4	1,087
Electrical laboratory equipment	7,636	10	8,400	2	8,585	...	8,585	6	9,100	8	9,828
Advertising sign	438	10	482	2	492	...	492	6	526	8	568
Materials and supplies	50,065	5	52,568	...	52,568	...	52,568	6	55,722	4	57,951
Meters, transformers, and arc lamps in stock	27,471	5	28,845	...	28,845	...	28,845	6	30,576	4	31,800
Operating capital											245,000
Work in process and cash on hand for Genesee Street building											478,290
											\$4,111,246
											298,132
											\$4,409,378
											220,469
											\$4,629,847
											77,164
											\$4,707,011

Allowance for piecemeal construction at 10 per cent on items 2 to 12b inclusive.

Total money out of pocket for reproducing physical property connected to customers ready for operation.

Promoter's profit at 5 per cent.

Brokerage at 2½ per cent on two-thirds of property

Note: These figures do not contain allowances for a general contractor's profit, going concern value of property, cost of discarded machinery, value of license contract, or franchise value.

It will be noted that the final result is built up by calculating each percentage, not only upon the labor and materials cost, but also upon the amount of each previous percentage. The result is that the percentages thus computed aggregate 49 per cent of the labor and materials cost.

How this method of calculating percentages affects the final result may best be shown by the following instance: The company, about 1903, purchased at one time 3000 enclosed arc lamps for street lighting from the General Electric Company. The unit price of these enclosed arc lamps assumed by the witness in his evidence was \$21.70, and to that he added, as is shown by the preceding table, certain percentages, and the following shows the result which the company claims as the value of these enclosed arc lamps at the present time, and that without being installed, the installation cost not appearing in these figures:

3000 municipal arc lamps @ \$21.70		\$65,100.00
Engineering and supervision, 5%	\$3,255.00	
Organization of business, 8%	4,101.30	
Taxes and interest during construction, 4%	2,898.25	
Piecemeal construction, 10%	7,535.45	
Promoter's profit, 5%	4,144.50	
Brokerage, 1%	1,453.46	
		<u>23,387.96</u>
Total		\$88,487.96

Note: Each percentage is computed upon preceding percentages.

Dividing the total value, \$88,487.96, by 3000, the number of lamps, we find that the company claims as the value of each of these lamps uninstalled \$29.49. As a matter of fact, the actual cost to the company for these lamps uninstalled was \$13.53 $\frac{1}{3}$. So far as has been disclosed by an examination of the books, the company never paid for a single enclosed arc the sum of \$21.70, and the average cost of all enclosed arc lamps which it has bought, exclusive of these 3000, was \$16.75 each. We are unable to understand, and no explanation has been offered us, why a company which has been in existence for years should be entitled to charge a promoter's profit of 5 per cent upon new arc lamps which it buys for its service. We are also unable to understand why a 10 per cent charge, amounting in this case to \$7535.45,

is proper for piecemeal construction in the case of buying 3000 arc lamps at one time.

Passing this matter, however, and assuming that some percentage charges are proper, at least in certain cases, the amount of such percentage is a matter of serious consideration. The discrepancies in the evidence of the witnesses upon these percentages as applied to the facts of this case were such as to require attention, and accordingly three engineers were asked to prepare detailed estimates of the engineering cost which would be necessary in order to reconstruct new the existing plant of the respondent. The engineers kindly complied with this request and the result is interesting. The tables on folded leaf show exactly what was submitted by them.

It will be noted that engineer A finds the total of salaries and expenses to be \$217,022, engineer B to be \$82,800, and engineer C \$103,750. The total for salaries, wages, and fees given by engineer A is \$192,872, as against \$55,200 given by engineer B. Engineer B gives a total profit to the engineering firm of 50 per cent, amounting to \$41,400, but nothing is offered to show why the engineering firm should have any profit at all. It is not necessary to do more than simply to call attention to the details of this table as showing that engineers indulge in the widest latitude of opinion as to the cost of the work with which they should be the most familiar, namely the engineering. If the Commission were required to pass upon this evidence, it would simply have to make a guess as to which engineer is right, and the Commission believes that the elimination of guessing in a case of this character is an end greatly to be desired and to be attained if possible.

Returning now to the cost of the fixed capital of the company December 31, 1911, as shown by the report of the examiners and engineers of the Commission, the following table is a summary of the same:

Account	Fixed capital Aug. 1, 1892	Fixed capital expenditures Aug. 1, 1892 to Dec. 31, 1911	Total book cost fixed capital Dec. 31, 1911	Included in fixed capital but not in service Dec. 31, 1911	Fixed capital owned and in service Dec. 31, 1911 — Ex- aminer's and engineer's cor- rected cost
	<i>Dollars</i>	<i>Dollars</i>	<i>Dollars</i>	<i>Dollars</i>	<i>Dollars</i>
Land devoted to electric operation.	153,993.00	58,560.95	212,553.95	212,553.95	212,553.95
Buildings.	107,696.00	3,817.78	103,878.24	103,878.24	33,890.99
General structures.	9,368.00	24,522.99	33,890.99	.....	6,002.09
General office equipment.	.....	6,002.09	6,002.09	.....	18,271.33
General stables equipment.	.....	18,271.33	18,271.33	.....	428.27
General shop equipment.	.....	428.27	428.27	.....	.....
Furnaces, boilers and accessories.	64,789.00	34,827.92	99,616.92	99,616.92	.....
Steam engines.	92,328.00	84,874.03	177,202.03	84,874.03	.....
Electric generators and accessory electric power equipment.	246,303.25	7,465.97	246,303.25	246,303.25	.....
Miscellaneous power plant equipment.	85,800.00	.....	85,800.00	85,800.00	.....
	820,277.25	131,371.82	951,649.07	880,472.44	271,176.63
Sub-station equipment:					
Electric generators.	.....	314,281.74	314,281.74	41,076.14	273,205.60
Accessory electric power equipment.	.....	63,855.26	63,855.26	627.55	63,227.71
Sub-station equipment.	.....	199,402.40	199,402.40	.....	199,402.40
Miscellaneous power plant equipment.	.....	9,178.69	9,178.69	7,031.32	2,147.37
	.....	586,718.09	586,718.09	48,735.01	537,983.08
Sub-station buildings.	.....	47,097.97	47,097.97	.....	47,097.97
Overhead distribution system:					
Poles and fixtures.	74,154.43	54,914.09	129,068.52	.....	129,068.52
Overhead distribution system.	49,041.87	145,146.61	194,188.48	.....	194,188.48
Line labor.	.....	40,148.71	40,148.71	.....	40,148.71
Electric services.	.....	3,249.58	3,249.58	.....	3,249.58
Municipal street lighting sys. em.	.....	46,828.43	46,828.43	.....	46,828.43
	123,196.30	283,788.32	406,984.62	.....	406,984.62

Underground distribution system:					
Underground conduits.....	45,845.00	185,819.60	231,464.89	9,606.32	221,888.37
Underground distribution system.....	8,224.54	193,928.11	201,482.05	.....	201,482.05
Underground labor.....	.....	20,081.11	20,081.11	.....	20,081.11
	54,069.54	399,828.91	452,998.45	9,606.32	443,392.13
Line transformers and devices:					
Electric services.....	16,500.00	238,758.62	245,258.82	26,342.60	228,916.02
Electric meters.....	.....	44,133.34	44,133.34	.....	44,133.34
Arc lamps.....	4,793.05	194,061.74	193,854.79	6,478.44	193,376.35
Installing arc lamps.....	93,874.00	132,901.57	226,775.57	146,509.33	78,266.24
Electric motors.....	2,827.50	.....	2,827.50	.....	2,827.50
Electrical laboratory equipment.....	.....	73.00	73.00	.....	.....
Other tangible electric capital.....	76.00	2,831.89	3,007.89	76.00	2,931.89
Miscellaneous construction expenditures.....	.....	870.48	870.48	.....	870.48
Transformer and electric meter installation material.....	.....	3,046.55	3,046.55	.....	3,046.55
Steam heat plant.....	2,500.00	6,940.68	6,940.68	.....	6,940.68
	120,570.55	1,713.88	4,213.88	4,213.88	.....
	120,570.55	625,945.75	746,516.30	184,607.25	561,909.05
Total tangible capital.....	1,118,113.64	2,073,850.86	3,191,964.50	923,421.02	2,268,543.48

Figures in *italics* indicate a deduction.

Criticism of the Company upon the Cost as Shown by Its Own Books

As above stated, the company submitted a memorandum reviewing the examiner's report. Such memorandum included a comparative statement showing the cost as disclosed by the report and the valuation as given by its chief witness of the physical property. The cost as disclosed by the report is \$2,268,543.48; as given in the evidence of its witness, the labor and materials cost is \$2,633,638: a difference of \$365,094.52.

The company justly remarks that it is difficult to compare the totals of various classes of work for the reason that they are distributed differently in the examiner's report and in the inventory prepared by its witness. One single example will illustrate. The cost of installing arc lamps is made a separate matter of estimate by the company's witness, while in the examiner's report such cost is carried into "Overhead Distribution System". In order to correct this matter and afford a fair basis for comparison, the Commission has prepared a comparative statement of the estimates of cost of reproduction as given by the City and company, and the book cost of the property of the company as disclosed by the examiner's report as of December 31, 1911, in which by rearrangement the same matters are allocated all to the same class, and the following is such rearrangement:

	City	Company	Cost
Land.....	\$171,000.00	\$244,993.00	\$212,583.95
Buildings.....	96,939.00	98,813.00	80,988.96
General equipment (including tools).....	31,704.00	33,135.00	24,701.69
Sub-station equipment.....	575,696.00	593,100.00	537,983.08
Overhead distribution system.....	504,595.00	534,981.00	464,532.69
Underground distribution system.....	560,713.00	544,701.00	443,392.13
Line transformers and devices without installation.....	240,047.00	255,907.00	228,916.02
Electric meters without installation.....	156,832.00	208,104.00	193,376.35
Arc lamps.....	90,813.00	111,830.00	78,266.34
Electrical laboratory equipment.....	8,610.00	7,636.00	2,981.89
Other tangible electric capital.....	438.00	438.00	870.48
Total fixed capital.....	\$2,432,387.00	\$2,633,638.00	\$2,268,543.48

The following is a brief discussion of the questions raised by the company and the disposition of them, which in the opinion of the Commission is proper:

Land:

The cost of land as shown by the books of the company is \$212,583.95. This should not be allowed. The following table shows each parcel owned by the company which it claims to be in the public service, the valuation put thereon by the witness for the company, the valuation given by the witness for the City, the book cost, and the amount allowed:

Parcel	For Company (Mahoney)	For City (Parke)	Books	Allowed
Staats street.....	\$64,993	\$50,000	\$64,993.00	\$64,993
Tonawanda street.....	17,750	14,200	17,750.00	not used
Niagara and Tonawanda.....	11,250	6,000	11,250.00	not used
City of Lackawanna.....	1,000	800	865.00	1,000
Genesee and Huron.....	150,000	¹ 100,000	117,725.95	150,000
Totals.....	\$244,993	\$171,000	\$212,583.95	\$215,993

¹ Not Parke.

The two parcels at Tonawanda street, and Niagara and Tonawanda streets, it is claimed by the City are not used in the public service at the present time. This claim appears to be well founded, and the Commission has been unable to find any satisfactory evidence in the case warranting a different conclusion. They are therefore not reckoned, although the City, pursuant to the direction of the Commission, gave evidence as to their value.

As to the parcel of land called Staats Street parcel, we are disposed to accept the valuation of the witness Mahoney. As to the parcel at Genesee and Huron streets upon which the new electric building is erected, the cost was \$117,725.95 as carried upon the books of the company. We are satisfied that the value is at least \$150,000, and have so allowed it. The total amount, therefore, allowed for value of land is \$215,993.

General Structures:

Upon this item not disclosed separately in the foregoing table there is a difference between the book cost and the witness's valuation: a difference of \$3827.01. The company offers some conjectures as to how this difference arises, and

says it is probable that some parts of an old building were used. It should have offered evidence instead of conjecture to meet this point.

General Equipment:

This includes office, stable, and shop equipment, and the difference between the cost and the appraised value of the witness is \$7494.31. Without going into details on an item so small as this, we are inclined to believe that the criticism of the company should be accepted and that this sum of \$7494.31 should be added to the value of the property. It appears that some of the property inventoried, and which the company unquestionably has, does not appear upon the books.

Sub-station Buildings:

The amount upon this item which the company thinks should be allowed, in addition to that appearing upon its books, is \$13,997.03. It offers nothing but conjecture to support this contention, and at least one consideration offered by it shows that the examiner has allowed matters which should not have been allowed. Thus, on page 58, as is cited by the company, part of the expense is for tearing down an old building. This is clearly an operating expense and not a charge to fixed capital.

Electrical Laboratory Equipment and Other Tangible Electric Capital:

The difference on these items is \$5210.63. It is claimed that the books do not represent all the property in existence which is used by the company in the public service. We are inclined to think that this is correct, and therefore this additional sum of \$5210.63 should be allowed.

Arc Lamps:

The company says: "The difference in this account amounts to \$34,324.26. With the exception of an item of \$2827.50, there is no valuation given for the cost of the installation of 5293 arc lamps at present in use." This is

correct in a sense, although incorrect as to its application to the case, for the reason that the cost of installation is put in the cost of Overhead Distribution System.

This different allocation of the cost of installation is said by the company to account for about \$4000 of the difference. It then remarks: "The balance is caused by the low price per lamp obtained from the books on account of an exchange of old lamps made with the manufacturer"; and it adds some comments thereon.

This matter of arc lamps has been carefully looked into, and as hereinbefore shown, the difference does not arise from the low price allowed for the old lamps exchanged. The transaction which the company evidently had in mind was one of the purchase of 3000 arc lamps for street lighting in 1903, and as above stated, it values those lamps at \$21.70 each. As matter of fact, the manufacturer originally asked but \$18 each for these lamps, and the purchase was a matter of considerable negotiation. There was first deducted from the price 10 per cent, and then an arbitrary deduction of one dollar per lamp, so that the final price reached was \$15.20 per lamp; and then for reasons which the company can easily ascertain from correspondence, there was a further deduction made which amounted to \$5000. The following statement shows just how the cost of \$13.53 $\frac{1}{3}$ per lamp was arrived at:

3000 arc lamps at original base price.....	\$18.00	
Less 10 per cent.....	1.80	
	<hr/>	
	\$16.20	
Less arbitrary deduction	1.00	
	<hr/>	
	\$15.20	
Less cash rebate of \$5000 on 3000 lamps.....	1.67	
	<hr/>	
Cost per lamp		\$13.53 $\frac{1}{3}$
Total original cash payment.....	\$42,000.00	
Plus allowance of \$1.20 each for 3000 old open arc lamps returned	3,600.00	
	<hr/>	
	\$45,600.00	
Less cash rebate.....	5,000.00	
	<hr/>	
3000 lamps for	\$40,600.00	
	<hr/>	
Price per lamp		\$13.53 $\frac{1}{3}$

We perceive no reason for increasing the amount over the book cost, and the company by referring to its own records can easily determine whether this is right or wrong.

Sub-station Equipment:

Under this head a storage battery is carried upon the books of the company at \$77,499.31, and this amount appears in the examiner's report. The company claims the battery to be worth \$90,000.

The facts are that the company had an old battery which it was carrying on its books at \$77,499.31. In the year 1911 it entered into a contract with the Electric Storage Battery Company to replace the old battery with a new one for a cash payment of something over \$60,000, and the constructing company to be entitled to all the old materials in addition to the above mentioned payment. As a result of this transaction the company did not change the sum at which it was carrying the battery upon its books. It however considers that the battery is worth \$90,000, which is \$12,501 in excess of the book cost. This matter was the subject of some contention in the oral evidence; and as a result of the whole situation, but without discussing it further, we think that it will be reasonable to add this sum of \$12,501 to the book valuation of the property.

Underground Distribution System:

The examiner deducted from the cost of this system the sum of \$8079.65 for commissions paid in connection with the underground conduit system. This deduction should not be made unless the services claimed to have been rendered for which the commissions were given were of no value. The company says in its memorandum: "It is a fact that the company has had its work done very economically as a result of the superintendence which has been given it"; and this contention appears to be justified by the cost of the system. Therefore this sum should be restored to the cost of the property.

This is as far as it is necessary to pursue the criticisms of the company in detail. There is a very considerable criticism upon the costs as disclosed by its own books of the distribution systems, both overhead and underground. It does not question that the examiner has correctly reported the facts as disclosed by the books, but it presents the argument that it is probable that a large amount of the labor cost was charged to repairs, and hence went into the operating expenses rather than to cost of capital: in other words, that its foremen and bookkeepers allocated a part of the real cost to operating expenses when they should not have so done.

It gives an elaborate table showing the repair costs from August 1, 1892, to December 31, 1908, and claims that upon their face they show that they are excessive for a plant of the size of that owned by it.

There should be no question raised as to the allocation of these expenses since the 1st day of January, 1909, at which time the Uniform System of Accounts was put in operation, and we do not understand that the company raises any, its criticisms being confined to installations made and work done prior to that date.

In determining whether the company's contention is correct, we have several matters to aid us: (1) ratio of operating expenses to earnings before and after January 1, 1909; (2) general observation of the books with reference to the care in handling details as to distribution between capital and operating expenses; (3) difference in unit prices used by the company's witness and those disclosed by the books; (4) the inadequate explanations made of the difference by the company, which certainly has more knowledge of the facts than anyone else; (5) failure of the company to avail itself of data at its command to test the correctness of its theory as to the cause of the discrepancy.

The difference in unit prices shown by the books and vouchers of the company and those adopted by the witness really explain the greater part of the difference. As to the

ratio of operating expenses, if the company's theory is correct, that ratio should have been much greater prior to January 1, 1909, than after. An examination has been made as to the fact, and the following table shows the results from July 31, 1893, to December 31, 1911:

Period ending	Operating revenue	Operating expenses	Operating ratio
	<i>Dollars</i>	<i>Dollars</i>	<i>%</i>
July 31, 1893.....	402,435.41	226,662.17	56.40
July 31, 1894.....	403,664.93	205,117.55	50.75
July 31, 1895.....	406,076.69	197,074.51	48.50
July 31, 1896.....	411,515.35	182,597.38	44.40
July 31, 1897.....	395,835.94	182,495.77	45.72
July 31, 1898.....	404,154.83	198,099.06	49.05
July 31, 1899.....	474,840.97	205,473.41	50.70
July 31, 1900.....	439,521.16	200,24.01	45.57
July 31, 1901.....	507,066.52	212,103.07	41.75
July 31, 1902.....	567,799.22	249,480.95	43.90
July 31, 1903.....	566,937.66	262,194.45	46.25
July 31, 1904.....	653,095.81	267,293.94	40.85
July 31, 1905.....	736,606.77	305,140.10	41.45
July 31, 1906.....	794,952.19	343,007.66	43.23
July 31, 1907.....	835,581.76	397,281.44	47.50
July 31, 1908.....	927,761.30	435,594.86	46.95
Dec. 31, 1908.....	414,145.04	200,196.02	48.30
Dec. 31, 1909.....	967,455.53	485,878.26	50.51
Dec. 31, 1910.....	1,085,311.63	565,627.46	51.15
Dec. 31, 1911.....	1,213,139.20	630,961.34	52.00
Totals.....	12,541,890.91	5,955,463.34	

A glance at the operating ratios prior to the year 1909 shows that they were very much less, except for two years at the beginning of operations and the year 1899, than they have been since January 1, 1909. This fact is not considered to be conclusive, but it certainly has its weight when we come to conjecture in determining this question.

Such summaries of repairs as are presented by the respondent are so general in their nature as to be of but very little if any use in determining the real facts. The summary stops with the year ended December 31, 1908. The company fails to take into account that the repairs for the year 1911 were \$60,770.34, which amount has been exceeded but twice in the existence of the company, and which, if the accounts of the company were correctly kept, includes repairs only and nothing which properly should have been charged to fixed capital. It also failed to call attention to the fact that the repairs for the year 1910 amounted to

\$42,341.79, which is above the average for the entire period of the operations of the company. Such variations, however, from year to year, are not the basis of any proper deduction. Thus the repairs for the year ended December 31, 1896, were \$41,633.37 according to the company's tabulation, while for the year ended December 31, 1897, they amounted only to \$34,287.83. For the year ended December 31, 1899, they reached only the sum of \$27,915.41. From such results as these anything can be guessed; and if the company had been able to show by a review of its vouchers for any one year that a considerable amount had been included therein for repairs which properly should have been charged to capital account, the situation would have presented an entirely different aspect.

Value of Franchise

It is a fact that the respondent has a perpetual franchise covering all the streets and public ways of the city of Buffalo. This franchise was acquired in the purchase from the Brush company and the Thomson-Houston company of the fixed capital and franchises of those companies.

It is not quite clear what position the respondent takes concerning this franchise, as to whether it should be treated as an item of property having a value upon which the company is entitled to a return, or not. At page 39 of its brief it indicates three possible values, as follows:

Reproduction value new, with additions, etc.....	\$6,166,140
Commercial value	5,948,800
Net earnings value	5,750,000

In none of these valuations does a valuation appear for franchise, but upon pages 29-33 of its brief it argues that the franchise has value, and concludes as follows:

If it has a value, or if that value was validly agreed upon and capitalized under the laws in force when it was done, such value can not by statute be excluded from the total valuation upon which a public service corporation is entitled to a return.

In another place in the same brief the following language is used:

All three of the bases for the valuation of franchises in that case are present in this case, viz.:

(a) The franchises were included in the valuation in strict compliance with the then existing laws of the State.

(b) The agreement under which the franchises were included in the "aggregate value" of the properties, franchises, and rights consolidated has always been recognized as valid; otherwise it must be assumed that some attack upon it would have been made by some public authority during the twenty years during which it has continued.

(c) The stock has been dealt in for more than twenty years on the basis of its validity; and to declare the basis of it invalid after such a lapse of time would be to do great injury to innocent investors who have relied and had the right to rely upon the validity of an issue of stock made strictly in accordance with the law.

It must be assumed from the foregoing language that the respondent expects that some franchise value must be allowed it in fixing the rate. It recognizes that the stock and bonds which were issued to the Thomson-Houston and Brush companies amounted to \$3,000,000; that the physical property had a value of practically \$1,100,000, thus leaving \$1,900,000 to be accounted for in intangibles of some character.

The respondent has made no proof whatsoever regarding this alleged franchise value, but if it claims any return thereon it relies wholly upon the argument presented in its brief.

It is true that a great deal has been said about franchise value in rate cases. It is unnecessary at this time to review what has been said. There is one paramount fundamental consideration which, in the judgment of the Commission, is conclusive upon the whole matter, and the facts upon which it is based are as follows:

It does not appear that any sum whatever was ever paid by the respondent or by its predecessor companies for this franchise. It was a gift by the City of Buffalo to the predecessor companies, and consists wholly in permission to use the streets of the city for the placing of poles, stringing of

wires, and placing of conduits. The company was given this privilege, without which it could not transact its business. It is true that the franchise is of value to the company, and that without the franchise the remainder of its property would not possess any exchange value as an electric plant, or such as might be given it when coupled with the expectation that a franchise would be given. If it were entirely certain that no franchise would be given, the property would have no exchange value except for purposes other than the distribution of electric energy. The franchise gives life to the enterprise and makes possible a return upon the capital which has been sunk in it. It makes possible a sale of the concern to other investors if those constructing it desire to part with their interest. It is indispensable to the conduct of the enterprise. All of these considerations, however, entirely fail to show that the public should pay a return upon some amount assumed to be the value of the franchise. The investors did not put the franchise into the enterprise. That was done by the public.

The whole truth lies in one sentence: If the franchise, which was a gift from the public to the company, should be made the basis of a money return, the practical result would be that the public would have to pay money to the company because it had given the company the right to occupy the public streets with its plant. This is the whole of the matter, and when thus stated, there is but little more to be said.

The City of Buffalo as a municipality has given the company a right to place its poles and string its wires in the streets for the purpose of lighting the streets. The argument that the franchise thus given has a value for rate making purposes comes just to this: that the City must annually pay to the company, in addition to all just amounts for operating expenses, taxes, amortization, and a proper return upon the investment made by the stockholders, a further sum because of the right which the City itself had given to occupy its streets. The company desires to make money by

lighting the streets. It can not so do without having its plant in the streets. The City consents that the plant may be put in the streets, and the company then desires the City to pay it a large sum because it has consented to such use of the streets. If the franchise was of the value of \$2,000,000, as seems to have been assumed in the consolidation, and the proper return upon this is 6 per cent per annum, the public in the City of Buffalo would be required to pay \$120,000 each year to the respondent for no reason whatsoever except that it had given the company the right to occupy the public streets with its plant. We are not prepared to say that either the municipality of Buffalo or the customers of the company residing in Buffalo should pay anything to the respondent on this account.

*The Contract with the General Electric Company of
Schenectady*

It has been hereinbefore pointed out that in the year 1892, shortly after the consolidation, the respondent issued to the General Electric Company of Schenectady its common stock to the amount of \$800,000 and its bonds to the amount of \$100,000, which stock and bonds are now outstanding and form a part of the capitalization of the company. The precise position of the respondent regarding this issue of stock and bonds is not quite clear. At page 28 of its brief it uses the following language:

We have pointed out under the heading "Superseded Property" the advantages secured to this company by that contract, and while it would appear that with the expiration of patents and the general expansion in the way of manufacturing electrical apparatus, this contract is now of little value, yet we maintain that it was a contract of great advantage when entered into and for a period of years thereafter, and as \$700,000 par value of our securities have passed out and are now in the hands of innocent investors, these facts should be taken into account at least in arriving at the cost of the company in establishing the business.

On page 36 it says with reference to this contract:

Its value has practically disappeared, but the securities have passed into the hands of innocent holders. We submit under these circumstances it would be unfair to ignore this contract and the securities issued upon the faith of it in arriving at the fair value of our property. The contract was entered into in good faith. It was deemed for the best interests of the company. It apparently was a form of contract usual in this business. It undoubtedly helped to establish the company as a successful concern.

Contract D with the General Electric Company of Schenectady is altogether too long to admit of analysis at this point. A brief description of its terms is as follows:

It contemplates the sale by the Schenectady company to the Buffalo company of such apparatus as the latter may need from time to time, and the 8th paragraph of the agreement is in the following language:

The licensor [Schenectady company] hereby covenants to sell to the licensee [Buffalo company] from time to time for cash or on such terms as may be agreed upon, such apparatus as at the time may regularly be made by or for the licensor, and may be needed by the licensee for its use in said territory for central station lighting and stationary motive power purposes, at the lowest current prices of the licensor to its other licensees under this form of contract and license, for similar apparatus purchased in like quantities.

The Schenectady company also agrees that it will defend all suits brought against the Buffalo company for violation of patents; that it will not sell to any person or persons other than the Buffalo company any apparatus for use in central station lighting in Erie county except in Tonawanda, nor any central electric motors to be operated from central lighting or power station, nor any generators for operating such motors therefrom, so long as the Buffalo company shall faithfully observe the contract. There are also other provisions of minor importance under which the company may have derived some advantage. Thus the 14th clause provides that the Buffalo company shall have all the profits from time to time made by the Schenectady company on the sale of incan-

descent lamps to isolated lighting plants in the territory of the Buffalo company, namely, Erie county excepting Tonawanda, less 10 per cent of the selling price of the Schenectady company, which percentage it shall receive for sale; the word "profit" meaning therein the difference between the "price now current to the old Edison licensees and said selling price of the licensor [Schenectady company]".

It is true that the respondent gave evidence by an expert witness tending to show that this contract was of great value to the company. It is also true that, although the company has been under the same management from its organization in 1892 down to the present time, not one of its officers or employees was called to show the actual advantages, if any, which were realized from this contract. The price paid to the Schenectady General Electric in stock and bonds was \$700,000. The first and most important question would be, how much apparatus was bought under the terms of this contract by the Buffalo company from the Schenectady company? No evidence was given upon this point, whatever. An estimate, however, has been made by the Commission, and it does not seem to be probable that property of over the cost of \$900,000 has been bought under this contract. If this estimate is correct, it would seem that there was not much advantage in the contract arising from the purchase of the apparatus. It does not appear that any suits were brought against the company in the use of this apparatus which the Schenectady General Electric defended. It does not appear how much money, if any, was paid to the Buffalo company as "profits" on the sale of incandescent lights. In short, there is nothing but a speculative opinion as to the advantage which this contract was to the respondent, and it is only just to say that if the Commission thought it worth while to speculate upon this point, the conclusion would not be the same as that reached by the witness.

The foregoing considerations, however, do not go to the root of the matter. The return which the public should pay

to a corporation for service is based upon one set of considerations. How the return so paid should be divided among the shareholders is another matter and one in which the paying public has no direct interest. The corporation is entitled to a fair return from the public upon the efficient sacrifice it has made in performing the service, upon the fair value of the investment made for that purpose, and to no more.

The certificates of stock issued to the shareholder do not in the least determine the fair value of the investment. They are not a measure of the efficient sacrifice made. They are mere title deeds, as it were, to the investment. There can not be a just return upon both the investment and the piece of paper which shows title to the investment. The function of the stock is not to determine how much the public shall pay, but how what the public has paid shall be divided among the shareholders. The value of the stock is not determined by the figures printed upon the certificates, but by the amount it receives upon a division of what the public pays. The value is rarely par. If the stock receives a large sum as dividends, the value rises; if a small sum, the value falls.

If the amount the public should pay for the service were to be determined by the amount of stock issued, the result would be that the body having the power to determine the amount of stock would fix the return, and all consideration of the fair value of the investment used in the public service would go for naught. A stock dividend of say 100 per cent doubles the amount of the stock, but has no proper effect upon the rate the public pays. Such dividend neither increases nor diminishes the fair value of the property used in serving the public. It merely rearranges as between the shareholders the form and number of the pieces of paper showing their rights between themselves to the net earnings and to the property itself if ever divided amongst them.

If the Buffalo company was fairly entitled to a net return of \$100,000 before making the contract with the Schenectady company, how did the making of that contract justify increasing the return to be paid by the public \$50,000? What did the Schenectady company put into the enterprise which was of service or benefit to the public to the extent of making it just for them to pay 50 per cent more for the service received?

If the shareholders of the company made a contract with the Schenectady company which was advantageous to them as shareholders, they had an undoubted right to divide the net earnings of the company with the Schenectady company upon such basis as they liked; but for a supposed advantage to them, what justification is there for keeping their return from the public the same and increasing the amount the public pays in order to give something to the Schenectady company?

There has grown up, for some reason, a very peculiar and illogical notion with reference to the protection of so called innocent investors in the stock of a public service corporation which deserves a little attention at this point.

The underlying conception upon which this notion is based is that the return the public is to pay is based upon the amount of stock and not upon the amount of the investment: that it should be reckoned upon the figures printed upon the title deed to the property rather than upon the value of the property itself. There is no law justifying any such view, and certainly no equity or justice. Once it is clearly apprehended that a person buying stock in such a corporation is buying only a right to a certain proportion of the dividends, the confusion disappears and the whole matter is put upon a just basis. The amount of the dividends depends wholly upon the business success of the corporation, and no one pretends that there is any principle justifying an exaction from the public of more than a fair return upon the value of the property used in the public service.

If a purchaser is foolish enough to pay more for the stock of such corporation than would be justified by the reasonable amount of dividends, there is no principle of equity which requires that the loss should be borne by the public, but every principle of equity and law requires that it should be borne by the person making the investment. No one at the present time, in any careful consideration of the subject, attempts to maintain that the public should pay a return upon the stock. Everyone concedes that the return should be upon the investment; and yet from time to time we are met with a plea to protect the stock which is the title deed and disregard the investment which is the matter of substance

"Going Concern" Value

The respondent makes a claim for "going concern" value of \$1,200,000. In the Cataract case we considered the subject of "going concern" value in great detail, and there reached the conclusion that those matters which commonly constitute what is called "going concern" value should not be allowed as a part of the property of the company upon which the stockholders would be entitled to a return during the entire existence of the corporation. We also found that a situation might exist in which the company had incurred expenses, or had deferred profits at the commencement of business during the unprofitable period of operation which sometimes follows the establishment of a new business, which would entitle it fairly and justly to a return from the public in increased rates during such period of time as might be found necessary reasonably to reimburse the company for these matters.

Upon this view it is essential in fixing the rate of any company to examine into its past history and ascertain first if any of the claimed expenses were actually incurred; if any profits or returns to which the company was fairly entitled were not received; and if either or both are found to exist, then the inquiry should proceed further into an examination of the question whether the stockholders have

been properly reimbursed. Such an inquiry is very proper in the present case.

We should first inquire what the stockholders have actually put into the business in the way of tangible property or money, and upon this the evidence, clear and undisputed. The value of the tangible property as found in the examiner's report, and practically admitted by the company, in 1892, at the time of the consolidation, was \$1,118,113. There has been no stock sold for cash which has been put into the business above the sum of \$275,000. The proceeds of all other stock are shown to have been used in other directions. How much was actually realized for this stock does not appear, but it will be assumed that it was sold at par. No bonds were sold and the proceeds put into the business subsequent to the organization prior to 1907 except to the amount of \$316,000. In July, 1909, this Commission authorized an issue of bonds for new construction amounting to \$243,000; and in June, 1911, bonds to construct the new building to the amount of \$570,000. This includes everything that has been put into the business either from stockholders' money or from the proceeds of bonds, and the aggregate is \$2,522,113.

The total value of the property used in the public service as herein found is \$3,194,159. Some land not in the public service which is not included in the foregoing is of the value, according to the evidence of the company, of \$39,000. It has also sold some property formerly in the public service and has a mortgage thereon to the amount of \$26,000. Its total assets at the present time are, then, \$3,259,159. It follows from this that the company now has in the business \$737,046 which was derived from the earnings of the company, that is, paid for by such earnings. Since the organization of the company to December 31, 1911, the company has paid cash in dividends \$2,235,355. It has paid in interest \$2,314,516, being a total of \$4,549,871, which sum is returns received from the public for services rendered. This

added to the amount remaining in the property shows that the company has received from the public a total of \$5,286,917.

Assuming that the stock sold for cash was all put into the business at the time of the organization of the company, and that the tangible property to the amount of \$1,118,113 was in service at that time, and giving this tangible property a return of 8 per cent per annum for 19½ years to December 31, 1911, those returns would amount to \$2,173,256. Assuming that the bonds to the amount of \$316,000 were sold at the time of the consolidation, and the proceeds used in the business of the company at that time, these bonds were paid interest at 5 per cent for 19½ years, and this interest is \$309,100. The interest on the bonds for \$243,000 for 2½ years at 5 per cent would be \$30,375; and on the bonds to the amount of \$570,000 for 1½ years at 5 per cent the interest would be \$42,750. The aggregate of these payments by the company as interest on borrowed money invested in the business, and on tangible property invested in the business, at the rate of 8 per cent for the property and 5 per cent for the bonds, exactly what was paid, would be \$2,555,481. The total amount received as shown above was \$5,286,917, and if we deduct the returns on the tangible property put in by the stockholders and the interest paid on the bonds which were invested in tangible property from this, we have left the sum of \$2,731,436 which the company has received in 19½ years as return on intangibles. This return may be called promoter's profit; it may be called a return for risk incurred, for anything whatsoever, except that it can not be called a return for expense incurred or profits deferred, since they are fully taken care of in the previous calculation.

The following is a tabulation of the foregoing matters for the sake of clearness:

Total value of property used in public service, as found by	
Commission	\$3,194,159
Land not in public service	89,000
Mortgages on property sold	28,000
	<hr/>
	\$3,259,159

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Tangible property or money put into public service:	
Tangible property taken over in 1892.....	\$1,118,113
Stock sold for cash.....	275,000
Bonds sold for cash prior to 1907.....	316,000
Bonds for new construction (July, 1909).....	243,000
Bonds for new building (June, 1911).....	570,000
	<u>\$2,522,113</u>
Difference equals Returns left in business.....	\$737,046
Total received by company since organization to December 31, 1911:	
Paid in dividends.....	\$2,235,355
Paid in interest.....	2,314,516
	<u>\$4,549,871</u>
Left in business.....	737,046
Total received	<u>\$5,286,917</u>
Returns on	
(a) Tangible property	\$1,118,113
Stock sold for cash.....	275,000
	<u>\$1,393,113</u>
for 10½ years at 8%.....	\$2,173,256
(b) On \$315,000 bonds 10½ years at 5%.....	309,100
	<u>\$2,482,356</u>
(c) On \$243,000 for 2½ years at 5%.....	30,375
(d) On \$570,000 for 1½ years at 5%.....	42,750
	<u>\$2,555,481</u>
Total received	\$5,286,917
Deduct returns on tangible property as above.....	2,555,481
Returns on intangibles.....	<u>\$2,731,436</u>

This is only one way of looking at the matter. It is, however, perfectly fair and just. From this aggregate return of \$2,731,436 it might be just to say that the depreciation from the existing physical property should be deducted, and this may be assumed to be anything up to \$700,000, and even at that maximum it would leave a return of \$2,000,000 which somebody has received because of these intangibles.

Upon this view, it would seem that the stockholders or the promoters or someone had received a return fully commensurate for all matters connected with attaching of business which have been hereinbefore discussed, and that hereafter the stockholders should be content with receiving a just and reasonable return upon the value of the property which they now have in the public service, and this without creating any "phantom" property and assuming that it is something upon which the public ought to pay a return.

In addition to what is said in the case of The Cataract Power and Conduit Company regarding the practical working of the "going concern" value theory as a means of compensating the company for the cost of attaching business, it may be well to show how the same matter works out in the case of the Buffalo General Electric Company.

It should be borne in mind that the company is claiming a "going concern" value of \$1,200,000, and this it places principally upon the ground of cost of attaching business. Such is the theory advanced by various of its witnesses and apparently favored by counsel in their brief. One theoretical method of arriving at such cost is to assume that it is equal to one year's gross receipts of the company. Just what year should be taken is not clear from the evidence, but in this case we are apparently relegated to the year 1911, in which the gross receipts were \$1,213,139. If the amount claimed is not based upon this theory of one year's gross receipts, the coincidence between the two sums is somewhat remarkable.

The Commission has on file reports from the company for the years ended June 30, 1906, to December 31, 1911, both inclusive, and it has compiled from those reports a table showing the expense incurred by the company for attaching business during the six years named; also the operating revenues, the operating income, and the net increase in fixed capital during that time. The following is such table:

Period	Expenses for attaching business	Operating revenue	Operating income	Net increase in fixed capital
Year ended June 30, 1906.....	\$13,367	\$826,833	\$383,572	\$102,208
Year ended June 30, 1907.....	19,184	861,025	375,258	113,886
Six months ended December 31, 1907..	14,663	453,932	212,439	67,105
Year ended December 31, 1908.....	22,811	891,477	413,983	177,002
Year ended December 31, 1909.....	30,976	967,456	367,733	109,278
Year ended December 31, 1910.....	26,073	1,085,312	419,788	234,391
Year ended December 31, 1911.....	24,811	1,213,139	459,743	309,321

Analyzing this table, we find that in the year ended December 31, 1911, the operating revenue was increased over the operating revenue from the year ended December

31, 1910, by the sum of \$127,827. If the theory of one year's gross receipts represents the "going concern" value, then the sum of \$127,827 is to be added to the fixed capital of the company as a sum upon which the people of Buffalo must pay a return of not less than 6 per cent so long as the company continues in business. The expenses incurred for attaching business in the year 1911 were actually \$24,811, and all of these expenses were paid by the City of Buffalo, being charged to the operating expenses of the plant.

The operating revenue for the year ended June 30, 1906, was \$826,833. For the year ended December 31, 1911, such revenues were \$1,213,139, an increase of \$386,306. The total expenses incurred by the company in the period covered for attaching business were \$151,885, all of which were paid by the consumers, and not one cent of which was taken from the stockholders unless it be said that their dividends were reduced thereby. Such a claim as this would be rather futile, for the reason that the decision of the Commission in this case holds that their profits are now excessive and presumably have so been during the entire period.

The foregoing figures dissipate any claim that there is any reason in this case for reimbursing the stockholders of the company for expenses incurred or profits deferred.

The New Electric Building at Genesee and Huron Streets

Prior to the Fall of 1912 the respondent occupied rented offices. Several years since it purchased a tract of land at Genesee and Huron streets upon which were situate certain old buildings. These it caused to be torn down, and erected on the land a handsome structure for offices and storage purposes and work rooms. A part of the building is designed for rental for offices and other purposes, and is not in use or needed at the present time, at least in the service of the public. The City claims that no part of the land or building should be included in the property used in the public service, and this position is taken partly on the ground that by stipu-

lation the date to which the calculations and evidence in this case should be treated was December 31, 1911, at which date neither the land nor the building was in use in the public service, the building having been finally completed and thrown open to use about October or November, 1912.

As to this ground of objection we feel that it would be unjust to the respondent not to allow any part of this property to receive a return from the public upon the ground that for convenience in the trial of the case the date December 31, 1911, was assumed as the one to which the evidence should relate. If any calculations are needed to correct any maladjustment, as it were, because of taking in this land and building or some part thereof, they can readily be made.

The situation is confessedly somewhat difficult, owing to the fact that a part of the entire property is used in the public service and another part is not. The question for determination is what part is fairly used in the public service; and whatever its value may be, that should be included in the value of the property of the company upon which it is entitled to a return.

The facts of the case are as follows: The purchase of the land and sundry expenses therewith cost the company the sum of \$117,725.95. The land at the present time is claimed by the City to be of the value of \$100,000, and by the respondent \$150,000. We are satisfied that the estimate of the respondent in this respect is more nearly correct, and we are disposed to believe that \$150,000 is a fair value for the land without any buildings. The cost of the building to January 31, 1913, was \$479,925. The respondent claims that there are some further bills to pay in connection with it, but we have no sufficient proof in relation thereto to justify a finding thereon, in view of the fact that the respondent itself states that the exact amount is not known and that there are some adjustments to be made in the claims made by the contractors for extras. This brings the total value of the land and building up to \$629,925.

A portion of the building as above stated is designed for renting. A part of the offices are already rented for about \$21,000 or \$22,000 per annum. Still other portions are not rented, and if rented at the same rate would produce a revenue of approximately \$13,000. The rental value of the portion designed for renting may, therefore, be fairly assumed to be \$35,000 per year. The operating expenses of the building, however, for heat, elevator service, janitor service, and the like are estimated to be about \$2000 per month, or \$24,000 per year. The rent which the company formerly paid and which ceased by reason of the occupancy of the new building was \$5500 a year. We think that the proper disposition of the matter which is more nearly just to the public and to the respondent than any other which has been suggested, is to allow the total sum of \$629,925 as a part of the property in the public service; charge operating revenues with \$35,000, the rent actual and potential; charge expenses of operation with \$24,000; credit expenses of operation with \$5500, the rental which has been discontinued. The net result would be at 6 per cent return on the investment. The charge to the public would be increased \$37,795. Operating expenses would be decreased by \$16,500, which deducted from the return on the investment would leave \$21,295 as the rental paid by the company for its use of the entire building, which is a 6 per cent return on \$354,916. We do not think that any objection can reasonably be raised to this. The company is fairly entitled to occupy its own premises, and in constructing its building it was required to take into consideration future needs and the enlargement of its business. The building is a credit to the city as well as to the company, and the whole question should be treated with perfect fairness.

The Contract for Power with The Cataract Power and Conduit Company

The respondent procures practically all its power from The Cataract Power and Conduit Company. A small por-

tion is taken from the Niagara, Lockport and Ontario Power Company. The amount taken from The Cataract Power and Conduit Company in 1911 was 40,817,617 kilowatt-hours, for which there was paid \$319,322.44, at the rate of \$25 per horsepower. There was also purchased from the Niagara, Lockport and Ontario Power Company 1,176,800 kilowatt-hours, for which there was paid \$16,825.24. It becomes of great importance in this case to ascertain whether the cost of energy to the respondent is excessive and should be reduced. This question was presented in the Cataract case, and we found in that case that the price charged by that company was unreasonable and excessive and should be reduced 28 per cent: 28 per cent of \$319,322 is \$89,410. Based upon this finding in the Cataract case, the cost to the respondent for energy is excessive by this amount, and therefore it should be deducted from its operating expenses in endeavoring to establish the true amount of those expenses for the year 1911.

If the price charged by the Cataract company for energy, namely \$25 per horsepower, were fixed as is usual upon a schedule rate, the service terminable at the pleasure of either party, this would end the matter and no further discussion would be needed; whereas a most interesting question is presented by reason of the existence of an alleged contract between the two companies for power which is not terminable, according to the terms of said alleged contract, for many years.

In the Cataract case we held that there was no reason for attempting to question or disturb a contract between that company and the International Railway Company. The case of the contract with the International Railway Company is, however, clearly distinguishable from that of the contract between the respondent and the Cataract company. The case of the latter contract, however, demands a statement and some discussion.

The original agreement between the two companies was dated October 1, 1896, was to continue for a term of 35

years from November 15, 1897, and provided for the delivery of not less than 3000 electric horsepower 24 hours per day for every day in the year, at substantially \$33 $\frac{1}{3}$ per horsepower per annum. There were modifications to this price which it is unnecessary to state at this time. An additional agreement was made under date of November 2, 1896, modifying or supplementing the agreement of October 1, 1896. These contracts remain nominally effective for a period of years, but to what extent they were departed from or modified in actual practice does not appear in evidence.

Later on, in about 1902, negotiations were instituted for a modification of the contracts. The history of these negotiations is not particularly material, but at some time there was prepared a contract which is dated July 1, 1908. During the progress of the proceedings the City called upon the respondent for a copy of the contract existing between it and the Cataract company, and this agreement, dated July 1, 1908, was produced as such contract and a copy thereof delivered to the City, and such copy was introduced in evidence on the 23rd day of September, 1912, as the City's exhibit No. 11. The president of the respondent, when upon the stand on that date, being asked if this alleged written contract was in force between the two companies, answered, "Contractually, yes; operatively, no". The copy of the alleged contract thus introduced in evidence contained no signatures, and attention being called to this fact it was shown that the contract had not been in fact signed, and that the arrangement between the two companies thus rested only in parol.

Later on in the proceedings it appears that on or subsequent to the 23rd day of September, 1911, at which time attention was called to the fact that the contract had not been signed, the contract was signed by the executive officers of the two companies, notwithstanding the fact that complaint had been made against the rates charged by the respondent a long time prior thereto and the trial of the issues raised

by such complaint and the answer thereto had been commenced.

It is the contention of the City that all of the contracts above described between the two companies are void and are not binding upon this Commission in fixing the rate to be charged by the Cataract upon the one hand and paid by the respondent upon the other. As against this, the respondent claims that the contract dated July 1, 1908, is in force and effective; and that if it were not so, necessarily the contract of October 1, 1896, as modified and supplemented by the agreement dated November 2, 1896, is in force, which requires the payment by the respondent of \$331 $\frac{1}{3}$ per electric horsepower.

This contention between the parties brings under consideration three clauses contained in the supplemental agreement of November 2, 1896, which have not been heretofore detailed. These clauses are as follows:

Third: During the term of this contract and except as required by the terms of its said franchise from the City of Buffalo, Conduit Company shall not furnish or sell, nor will it authorize any one else to furnish or sell to any other company or person electrical power for use in municipal or domestic lighting within the present city limits of the city of Buffalo; and for any breach of this stipulation at any time Electric Company may suspend its taking of power or terminate this contract or recover damages; and all these cumulative remedies shall continue notwithstanding any prior waiver thereof.

Fourth: During the term of this contract, Electric Company will not, within said city, take, use, sell or employ any electrical energy for the purposes above mentioned, developed from the water of Niagara river, excepting that developed from the turbines of The Niagara Falls Power Company, at Niagara Falls, and delivered by Conduit Company, except upon failure of Conduit Company sufficiently to provide such energy when required under the terms of this contract; and except Electric Company may produce power by steam or otherwise within said city for its corporate purposes; and for any breach of this stipulation at any time, Conduit Company may suspend its supply of power or terminate this contract or recover damages, and all these cumulative remedies shall continue notwithstanding any prior waiver thereof.

The respective successors or assigns of the parties are declared to be entitled to all the rights, advantages and forfeitures and bound by all

the obligations, duties and conditions of and remedies against, their original parties respectively, as herein set forth, unless otherwise expressed.

Fifth: Conduit Company, in consideration of the premises and of the above agreements, will credit and rebate to Electric Company for the electrical horsepower paid for by Electric Company to Conduit Company during the year, a sum equal to thirty per cent of the price paid by it, from time to time, payable under said former contract for electrical horsepower exclusive of net receipts of sales from other than lighting purposes; such credit, or rebate, to be made quarterly on the fifteenth days of March, June, September, and December in each year, on which days payments are to be made to Conduit Company under the above mentioned agreement of October 1, 1896, and to be deducted from the sums severally payable on such successive days respectively as above provided.

The alleged agreement dated July 1, 1908, which the respondent claims to be the existing contract, also contains two articles of which the following is a copy:

Article VII. It is understood and agreed that the electrical energy deliverable hereunder is to be used, sold and distributed by the Electric Company within the said city of Buffalo and not elsewhere, for purposes only of municipal and commercial lighting and for power where the maximum rate of use by any one customer is not in excess of sixty (60) kilowatts; and the Electric Company covenants and agrees that during the term hereof, except with the written consent of the Conduit Company (1) it will not use or authorize or permit any person, firm or corporation to use any part of the electrical energy deliverable hereunder for any purpose other than hereinbefore in this Article specified; (2) it will not purchase, take, generate, use, sell, transmit or distribute any electrical energy other than the electrical energy supplied it by the Conduit Company hereunder, except upon failure of the Conduit Company sufficiently to provide such electrical energy when required under the terms hereof; and (3) in addition to the payments by it to be made under the provisions of Article IV hereof, it will pay the Conduit Company monthly on the 15th day of each month during the term hereof the rate of two dollars seventy nine and three-tenths cents (\$2.793) per kilowatt of the maximum rate at which any electrical energy shall have been purchased, sold, used, transmitted, or supplied by it in violation of any provisions of this Article.

Article VIII. The Conduit Company covenants and agrees that during the term hereof, except (1) with the written consent of the Electric Company or (2) as required by law or by the charter or franchise of

the Conduit Company, it will not furnish or sell any electrical energy for use within the said city of Buffalo for municipal or commercial lighting or for power purposes where the maximum rate of use of any one power customer is less than sixty (60) kilowatts; provided, however, that the provisions of this Article shall not be interpreted to prohibit (a) the continuing sale and provision of electrical energy by the Conduit Company to its present customers for the purposes for which such electrical energy is now used, or (b) the incidental use by the power customers of the Conduit Company of a part of the electrical energy supplied them for the purpose of lighting their factories and plants, or (c) the sale and provision of electrical energy to or for the use of manufacturing plants which the Electric Company may not be prepared to furnish electrical energy.

The Conduit Company covenants and agrees to pay to the Electric Company on the 15th day of each calendar month during the term hereof a sum at the rate of two dollars seventy nine and three-tenths cents (\$2.793) per kilowatt for the maximum rate at which at any time during the preceding calendar month it shall have supplied any electrical energy in violation of any provision of this Article.

It appears indisputably from the evidence in this case that neither of the parties has ever faithfully observed any of the contracts heretofore recited; that by arrangement on the part of their executive officers, or in deliberate violation of the terms thereof, both parties have from time to time departed from stipulations therein contained.

It further appears that since the making of the parol agreement evidenced by the unsigned contract of July 1, 1908, the energy delivered by the Cataract company to the respondent has not been billed in conformity to the terms of that agreement. The billing has been and is now at the rate of \$25 per horsepower without the modifications of that price which are specified in the agreement, which modifications have not been hereinbefore quoted, but which can be readily found by reference to the agreement.

It further appears that the parties, after the discovery of the fact that this parol agreement had not been signed, and when the rates charged by the Cataract and the rates charged by the respondent were both in question before this Commission, saw fit to endeavor to perfect this parol arrangement

by signing and delivering the written agreement — a clear recognition of the fact that up to that time there was no legal agreement in existence between the companies which was not susceptible to modification by the action of this Commission.

It further appears that the contracts executed in 1896 have long since been waived and abandoned by both parties, and are ineffectual and have not been effectual for years.

The legal questions presented by the foregoing facts are interesting and important. The Commission has weighed them with care and has reached the conclusion that it is at liberty to fix the rates to be charged by the Cataract company and by the respondent without reference to the terms of those alleged agreements. Irrespective of the question of the correctness of this conclusion, the facts detailed in the opinion in the Cataract case and in this opinion show beyond any question that justice, equity, and fair dealing with the public require that the rate charged for current by the Cataract company to the respondent be reduced as found in the Cataract case, and it is believed that both companies upon a full review of the entire situation will acquiesce in the justice and equity of this conclusion.

For these reasons it is deemed unnecessary to enter upon a prolonged discussion of the legal questions involved, although the Commission entertains no doubt that if the matter were brought before legal tribunals they would reach the same result as has the Commission.

General Amortization

The subject of general amortization has been left in most unsatisfactory condition. Until very recently the company has paid no attention to this matter in its accounts. Since the adoption of the Uniform System of Accounts prescribed by this Commission, it has established a fixed sum for depreciation of \$125,000 a year, charging against this the current repairs each year, with the result that in the year 1911 operating expenses were charged with general amor-

tization \$62,614.35. Against this amount was charged the sum of \$19,966.16 for depreciation subsequent to December 31, 1908, on capital retired during the year, leaving a net increase of \$42,648.19 in the reserve accrued amortization of capital, which at the close of the year amounted to \$163,681.36.

No evidence was offered by either party tending to establish the amounts required in the fair administration of the affairs of the company to take care of obsolescence, inadequacy, and wear other than the ordinary repairs to be expected during the year, except as is hereinafter stated. In the multitude of subjects requiring investigation and examination it is not strange that this did not receive more attention. In fact, the whole subject of depreciation and amortization is almost an unknown land in a plant of this character. There are a few general propositions which seem to be reasonably well established, namely, that the treatment which is to be extended varies with the character of the plant and its size. A large plant with various parts and having for its constituent parts various terms of life, when it has reached a sufficient size can sometimes take care of depreciation in repairs chargeable to operating expenses and does not require the establishment of any reserve. Of course, if the depreciation is taken care of in this manner, it requires investigation to know how much should be allowed for such expenses in the case of the fixing of rates. If we were to assume that this plant had reached that stage, the only guide that the Commission would have at this time would be the repairs and charges therefor which were made during the year 1911 and preceding years; but there is no evidence showing that the usual and ordinary amount was expended during that year for this purpose, neither is it made to appear that there is not a necessity for a reserve to take care of unusual retirements which come from the inadequacy or obsolescence of some large machine. The renewal of poles and many other matters will unquestionably

in the future be taken care of by charges direct to repairs, and just how much is needed for this purpose in the rate is not shown by any careful and well considered evidence.

Three of the witnesses were sworn on the part of the company, who testified in very general language that they had looked into the matter and ascertained that the company had established a flat amortization fund of \$125,000 a year; that about half of it was absorbed in general repairs for the year, leaving an amortization reserve of \$62,000, and that they considered this insufficient; that it ought to be at least double that amount: in other words, that the allowance for amortization in the way of repairs and creation of reserve should be substantially \$180,000 to \$185,000 instead of \$125,000.

No detail was given by any of these witnesses showing how this result was reached. The only thing certain about it is that each of them obviously based his estimate upon an estimate of the value of the property which is far in excess of that adopted by the Commission. Without making further comment upon this evidence, it is sufficient to say that the Commission does not adopt it as its guide. The directors of the company have established a rate which has not been particularly criticized except in the evidence offered by the company. In the absence of any evidence, going into the matter thoroughly and carefully, the Commission does not feel that it would be warranted in increasing the rate heretofore used by the company. On the other hand, the general examination of the case has led to the belief that this amount may perhaps be regarded as too large; but it is better to err upon the side of allowing too much rather than too little.

Under all the circumstances, it seems to be best to not interfere with the matter one way or the other, and allow the operating expenses to stand so far as this matter is concerned precisely as they were made up by the company in its annual report for 1911.

This is not a satisfactory disposition of the matter, but much reflection and prolonged consideration induce the belief that it is the best which can be made.

Unaccounted for Energy

During the year 1911 the respondent purchased electric energy as follows:

Bought of Cataract Power and Conduit Co.....	40,817,617 kw.h.
Bought of Niagara and Erie Power Co.....	1,176,800 kw.h.
Total energy bought	41,994,417 kw.h.
Used by respondent	267,960 kw.h.
	<hr/>
Sold by respondent	41,726,457 kw.h.
	26,912,240 kw.h.
	<hr/>
Leaving unaccounted for	14,814,217 kw.h.
Percentage of kw.h. bought unaccounted for.....	35.2

The foregoing, worked out in financial results, is as follows:

Total paid Cataract Power and Conduit Co.....	\$319,322.44
Paid Niagara and Erie Power Co.....	16,825.24
	<hr/>
Total paid for energy.....	\$336,147.68
35.2 per cent of this for energy not sold.....	118,323.98

In the transformation and distribution of electric energy there is necessarily a very considerable percentage of loss. The question presented in this case is whether a loss of 35.2 per cent is excessive and should be reduced by proper management. It is obvious that the question is one to which the attention of the company should at all times be most vigorously directed. One per cent in the amount of current purchased in 1911 would have involved a saving of \$3361.

Considerable evidence was given by both parties upon the question whether this amount of loss was excessive or otherwise. A great deal of this evidence was directed to technical matters which have no proper place in this opinion. The company also applied to a considerable number of companies elsewhere for reports concerning the amount of unaccounted for energy in their practice, load factors, and the like, and copies of the answers, without however disclosing the names of the companies, have been submitted to the Commission for its consideration. It is true that the loss of energy of two companies is hardly ever properly com-

parable, for the reason that the circumstances under which they operate are different. The load is different, and it is not possible to say that one company's loss is excessive because it happens to exceed that of another company.

We have, however, taken into account all of the evidence given in this case upon this subject, and the above matter submitted by the company, and have interpreted the same by the light of our knowledge of the operations of other companies, and their general conditions of operation as compared with that of the respondent, and we are clearly of the opinion that the loss of the respondent is greater than is warranted by good practice.

Early in the case the president of the company testified that 33.8 per cent was an excessive loss, and that the loss for the year ended December 31, 1910, which was 38.3 per cent, of course would be still more excessive. He further testified that although the loss was excessive and the amount of loss stated in dollars and cents ran into large sums, it had not occurred to him to look into the matter except in a general way.

This was prior to much of the technical discussion of engineers, and was also prior to the evidence offered by the respondent that in estimating the average loss the entire business of both the Cataract and the General Electric should be taken into consideration owing to the division of the general lighting load between them. Under the circumstances of the case the Commission is not convinced that this is the correct treatment of the matter. As before said, no two companies are exactly comparable upon the matter of loss of energy because of the circumstances being different; and the circumstances attending the operations of the Cataract company are so unusual that in our judgment it would be incorrect to consider its losses in connection with those of the General Electric.

It is exceedingly difficult to say, considering the circumstances under which it operates, what the unaccounted for

loss of the respondent properly should be. There is no doubt, however, that it should be less than it is; and it seems best, under all of the circumstances of the case, to hold that these losses at present should not exceed about 28 or 29 per cent of total energy purchased. This, however, should be regarded as merely tentative in any future consideration of the matter, and not a finding that a 28 or 29 per cent loss is justified for all time to come. It should be taken as a reminder at this time to the company that its attention must be given actively to the subject, and at the expiration of the term for which the rates are fixed in this case, further attention will be given to the subject; and in the meantime probably both the Commission and the company itself will receive enlightenment upon the subject which will enable a more just conclusion to be reached.

The deduction to be made from operating expenses on this account, after calculating the reduced cost of energy, will amount to about \$16,000.

General Summary as to Fair Value of Property in Service

The discussion has now reached the point permitting the summation of the various matters relating to the fair value of the property in the service of the company. The following is a summary of the matters hereinbefore discussed:

Corrected value of fixed capital as per books of company.....	\$2,268,543.48
Deductions:	
Cost of land Genesee and Huron.....	\$117,725.95
Land not in public service.....	17,750.00
Land not in public service.....	11,250.00
	<hr/> 146,725.95
	\$2,121,817.53
Add for value of land Genesee and Huron.....	150,000.00
	<hr/> \$2,271,817.53
Add on storage battery	\$12,501.00
Add deduction on conduits.....	8,079.65
Add general equipment	7,494.31
Add electrical laboratory equipment, etc.....	5,210.63
	<hr/> 33,285.59
	\$2,305,103.12
New building Genesee and Huron streets.....	473,700.02
Capital orders in process 1912.....	78,717.40
Additions to capital 1912.....	185,001.91
Working capital	100,000.00
Materials and supplies	51,637.45
	<hr/> \$3,194,159.90
Total fair value of property in service.....	

The following is a corrected statement of the estimated operating expenses and taxes for the year 1911:

Operating expenses 1911 as reported by company.....		\$693,575.69
Deduct:		
Unaccounted for energy.....	\$16,000	
Office rent	5,500	
Cost of energy.....	89,410	
		<u>110,910.00</u>
		\$582,665.69
Add:		
Operating new building.....	\$24,000	
Taxes	59,820	
Contingencies	50,000	
		<u>133,820.00</u>
		\$716,485.69
Deduct assumed rents new building.....		<u>35,000.00</u>
Total operating expenses and taxes.....		\$681,485.69

The foregoing estimate requires but very little comment in addition to what has been heretofore made. We have added to the operating expenses contingencies amounting to \$50,000. This item is designed to cover a number of matters of additional expense which will have to be incurred by the company beyond those which were actually incurred in 1911. The installation of a new schedule of rates will be a matter of very considerable expense. It will require a thorough canvass of all of the installations of customers. It will require a considerable temporary addition to the office force. It will require other matters unnecessary to be enumerated here, and it is only just that the company should be allowed the expense of the same. This item should, however, not be considered a permanent one and should be subject to future revision. Being an estimate, it may be too small; and again, it may be too large. There is no way of arriving at it accurately, but the Commission has endeavored to be liberal.

There are certain items of expenditure as reported in operating expenses for 1911 which should be reduced. The general administration expense is too large. Some of the promotion and advertising expenses should be cut out as being rendered unnecessary by the reduction of rates. The more

attractive rates will attract customers. It would, however, be good business practice on the part of the company, and it is also its duty, to advertise by means of proper literature to the residents of the city the advantages of the new rate and just how they can increase the consumption of energy very largely in residences without incurring any additional expense over that heretofore paid. The public will not understand this without proper literature, and the way to disseminate it is by leaflets containing calculations showing just what can be done, which should be mailed to each customer and furnished to all prospective customers. These leaflets will be preserved by the customer for reference, and are infinitely superior to newspaper advertising in this respect.

A definite, well figured statement, which can be preserved by the prospective customer for future reference so as to compare with his bills, is what should be adopted. In view of the fact that the company should incur an expense of this character, it has been thought best not to cut from operating expenses certain matters which will be useless in the future and probably never should have been incurred.

Since the Commission, as is explained elsewhere, contemplates that the rates put in force at this time should be revised after a period, it will be wise for the company to go over its operating expenses carefully and prune out all unnecessary or excessive items.

The operating revenues for 1911 derived from the sale of energy were \$1,204,006.94. The operating expenses and taxes as above stated amount to \$681,485.65, leaving as gross income \$522,521.25. This justifies a reduction in the earnings from operation of 25 per cent, or \$301,001.73, leaving for returns upon investment \$221,519.52. The company in 1911 had an operating revenue of \$9132.26 from other sources than the sale of energy, which, added to the foregoing returns from the sale of energy, would make a total return on investment of \$230,651.78.

Buffalo and Niagara Falls Electric Light and Power Company

In connection with the subject of returns on investment, both the public and the stockholders of the respondent should be fully advised of the results accruing to the company and the stockholders by reason of the ownership of the capital stock of the Buffalo and Niagara Falls Electric Light and Power Company. As hereinbefore stated, all of the stock of this company, which will be termed the Niagara Falls company, is owned by the respondent. To acquire this stock it issued \$614,000 of its own stock, and therefore in declaring stock dividends there necessarily went to the owners of this stock, amounting to \$614,000, dividend stock to the amount of \$205,700: assuming the amount of dividends to be \$935,000 as stated by the company in its report to this Commission. The report of the examiner shows the amount of such stock dividends to have been \$934,775. The difference of \$225 is too inconsequential to demand investigation as to how it arises. The respondent therefore has outstanding of stock chargeable to this investment \$819,700. It also issued on the original purchase of the Niagara Falls company's stock, bonds to the amount of \$200,000. It has been declaring upon the stock a 6 per cent dividend and paying upon the bonds interest at the rate of 5 per cent. The following is a tabular statement of the amount which it pays by reason of the investment:

Original issue	\$614,000	6% dividend	\$36,840
Dividend stock	205,700	6% "	12,342
Total stock outstanding	\$819,700	dividends	\$49,182
Bonds	200,000	5% interest	10,000
Total	\$1,019,700	Total payments	\$59,182

The Niagara Falls company's stock originally purchased was \$500,000. This company has declared a stock dividend of \$100,000, so that the stock now held amounts to \$600,000. This paid in 1911 a 6 per cent dividend, or \$36,000.

The apparent net loss annually is therefore \$23,182.

The foregoing calculation does not take into account the ownership of a portion of the respondent's stock by the Niagara Falls company itself. The effect of such ownership upon this calculation may be of interest to the mathematically inclined but it is not necessary for any purpose of this case.

The respondent is both a holding and an operating company. The foregoing figures show that as an operating company it has stock outstanding to the amount of \$2,904,300, and bonds to the amount of \$2,988,000: making a total of stock and bonds of \$5,892,300.

Fixing the Rate Schedule

However difficult it may be, the task of determining the fair value of the property of the respondent in service, and the average amount of reduction which should be made in the rate, is simple and easy as compared with adjusting the rate itself. The subject of an equitable rate for an electric light and power company is one which is but very little understood, although it has received an enormous amount of consideration and discussion. The elements necessary to be taken into consideration are so diverse, the difficulties in the way of ascertaining the facts are so great, the theory of the rate is so unsettled, and the difficulties of applying even an approximately correct theory in actual practice are so complex and varied, that the installation of a rate which would be admitted by everyone to be perfect has never yet been accomplished.

The public generally is prone to believe that the proper rate for electric energy delivered is a fixed price for a given unit, precisely the same as it would be for a bushel of wheat. Nothing could be further from the truth than this. It has come to be generally recognized, however, that there is a distinction between the lighting rate and the power rate which may properly be recognized in practice. Why there is a difference is not ordinarily known, and although

a minimum rate is perfectly just and equitable, the ordinary consumer is entirely unable to grasp the reason, and generally considers it an effort on the part of the company to get something out of him for which it has not delivered anything.

In this case the reduction of rate might be accomplished either by a horizontal reduction of the maximum rate from 9 cents to some lesser sum, or by a percentage reduction upon the existing schedule. Either of these methods would work the grossest injustice to consumers. This fact is very properly recognized by the corporation counsel, who says in his brief:

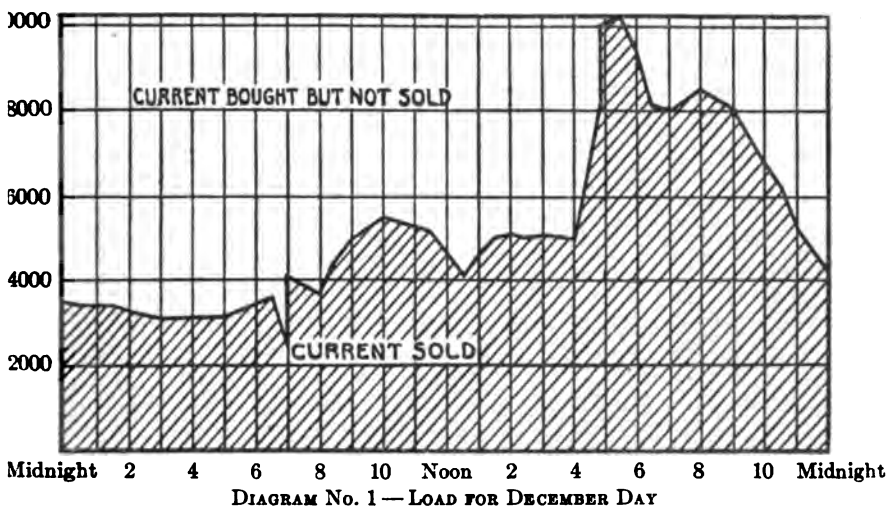
That the rate should not be fixed by applying a flat or percentage reduction to the rates now charged by the electric company, is so plain as not to require argument.

The truth of this statement is recognized by the respondent, and the Commission has accordingly in the interests of justice and equity been forced to the creation of an entirely new rate schedule. The existing schedule of the company it is not necessary to analyze to the utmost extent for the purpose of pointing out its inequalities and defects. Some of them will be adverted to later.

It is probably best, in view of this situation of the public mind, for the Commission to avail itself of the opportunity to state some of the elementary principles upon which the building of a correct rate depends. The discussion will not be for the benefit or advantage of those who have studied the subject, but an attempt will be made to set forth in plain and non-technical language those principles which are universally recognized, it is believed, by those who have made a competent study of the subject and which must be followed, so far as practicable, in producing a rate which reasonably approximates justice as between the different consumers. No excuse is needed for this elementary treatment of the subject at this time. It must be regarded as an effort to bring before the mind of the public, as well as

before corporations subject to the jurisdiction of the Commission which have not investigated the matter, a few principles which must govern electric rates.

An easy comprehension of any subject of this character is assisted by the use of graphic charts or diagrams. Diagram No. 1 is a representation of the load and load curve of the respondent, Buffalo General Electric Company, on a given day in the month of December, 1912. The company purchases electric energy from The Cataract Power



and Conduit Company and pays for it upon what is known as the peak of the load: that is to say, the greatest amount of current taken by it at any one time during twenty-four hours is taken as the amount of demand for current for the entire twenty-four hours. The figures at the bottom of the diagram represent hours, showing the twenty-four hours of the given day. The figures at the left of the diagram represent kilowatts, and show that between 5 and 6 o'clock in the afternoon of the given day the company was taking a little in excess of 10,000 kilowatts of energy. It therefore paid for this amount at the agreed price. It was entitled to

receive that amount of energy during the entire twenty-four hours without any additional consideration. As a matter of fact, however, it sold only that energy to its customers which is shown in the shaded portion of the diagram. That portion of the diagram which is white or unshaded shows the amount of energy which it might have sold if it could have found a customer for it, without increasing in the slightest degree the price which it paid for energy.

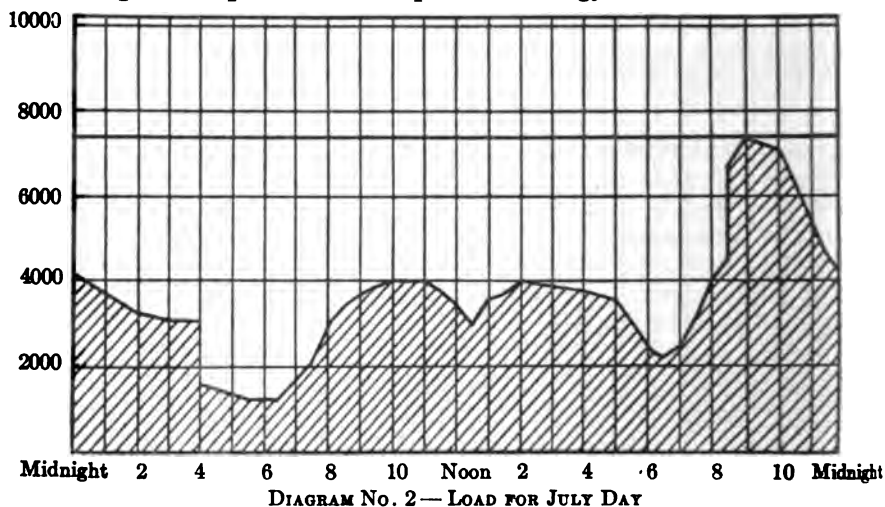


Diagram No. 2 shows the same facts for a day in July. That day something less than 8000 kilowatts was taken by the respondent at what is known as the peak of the load, and therefore it had to pay for nearly 8000 kilowatts and would have been entitled to that amount of energy during the twenty-four hours. It was able to sell, however, only that amount of energy which is shown in the shaded portion of the diagram and did not sell that portion which is unshaded.

The foregoing explanation relates to the sale of energy only. The same principle applies to the investment in the plant of the company. Referring to the first diagram, the company was obliged to have a plant adequate to distribute

among its customers 10,000 kilowatts of energy, and yet during a greater part of the day a portion of this capacity was not called into use nor required to perform the full duty for which it was capable. All of the return for the use of the plant to which the company was entitled for that day would, of course, have to be spread upon the energy sold and which is represented by the shaded portion of the diagram. If that expense could have been distributed upon the entire area of the diagram, on the shaded and unshaded portions alike, the price would necessarily be considerably reduced to each consumer.

These considerations bring into view the fact that the time during which energy is taken by the consumer is of the utmost importance. If he takes it at what is known as the peak of the load, that is to say, at the time when the demand is the greatest, the results to the company are greatly different from what they are if he takes it at some other time. Account should be taken of this fact in the making of any rate schedule. The results of this important fact should be clearly stated, and some of them are as follows: they are stated in numbered paragraphs for ease of reference:

1. The cost of current to the company is fixed, not by the amount used but by the greatest amount taken at any period during twenty-four hours or by the peak of the load.

2. The capacity of the plant is determined by the greatest amount of energy required by the consumers at any point of time in the year, and hence the cost of the plant or investment required in the business is determined by the peak of the load during the year.

3. Every consumer demanding service at the peak of the load during a given twenty-four hours adds to the cost of current for that day.

4. A consumer who takes current off the peak of the load adds nothing to the cost of the current to the company.

5. A consumer who takes no current at the yearly peak of the load adds nothing to the capacity or cost of the plant.

6. The consumer who adds to the cost of the plant by taking current at the yearly peak should equitably be required to pay a return of some amount upon the investment which has been made necessary solely by reason of his demand for service. This justifies a minimum charge of some amount.

7. If all customers were on the yearly peak, equity would require that since all must in some manner pay a given return to the company, each should pay that proportion of the whole which his demand bears to the total demand.

8. But the customers are not all on the daily or current peak nor the yearly or plant peak. Hence a method must be devised which will fairly distribute the plant cost of yearly peak between those who are on the peak and those who are not.

9. Every customer should pay all expenses which are incurred solely because he is a customer.

10. As to the daily or current peak, it would not be equitable to require only those who are on that peak to pay all the cost, although it is their demand which determines the amount to be paid by the company for current, since that would result in freeing those who take current off the peak from paying anything. Hence there must be some method devised of making an equitable distribution of cost of current between the various consumers.

11. The burden falls primarily on those who are on the peak on both cases because they are the ones who primarily create all the expense. Hence in order to relieve them, the first thing requiring attention is to create as large a demand off the peak as possible, thus creating a greater number to assist in bearing the necessary expense.

12. The peak both daily and yearly is created chiefly by the lighting load. The power load is largely off peak. Hence it is for the interest of those using current for light to encourage the use of off the peak power as much as possible.

13. In order to encourage this use of off the peak power a price must be fixed which will induce customers to take it. The price should be such as to pay a just sum for the current used and take off if possible some portion of the current cost from the peak load user. It should also be such as to contribute to some extent to the yearly investment cost.

14. In fixing power costs the company is compelled to take into consideration competitive costs or it can not get the business.

15. It must also fix the price at such a point as will induce if possible new uses for power.

16. It must also encourage a more extensive use by off the peak consumers.

17. Generally speaking, all lighting is on the peak, hence the basis to work from is the lighting rate.

18. Consumers of current for light should be induced to use current for power out of lighting hours. This will benefit the consumer and company if the rate is equitably adjusted. This can chiefly be done in residences. The field in stores, saloons, restaurants, churches, offices, and the like does not appear promising for much expansion.

19. The primary or lighting rate should be as low as possible in order to attract new customers in a town in which the business is not thoroughly developed.

20. The primary rate should cover only the peak load hours and should drop as rapidly as may be to induce longer hours of consumption and thus give a greater sum to spread the investment charge upon.

Consumers can readily be divided into classes in accordance with the time of service with reference to the peak of the load. Three diagrams have been prepared showing typical consumption. Diagram No. 3 is a theoretical showing of the current consumed in an ordinary residence. There is some consumption early in the morning between the hours of 6 and 8, and the greater amount of consumption is at

night from 4 o'clock until 11 o'clock, and varies at different times of the period. The shaded portion represents the current consumed and the white portion the current unconsumed during the twenty-four hours. The diagram itself is upon the same theory, showing in the base figures the hours of the day and in the vertical figures the kilowatts taken. It is plain on looking at the diagram in connection with the foregoing statement of principles that anything which will induce the use of current at noon and midnight

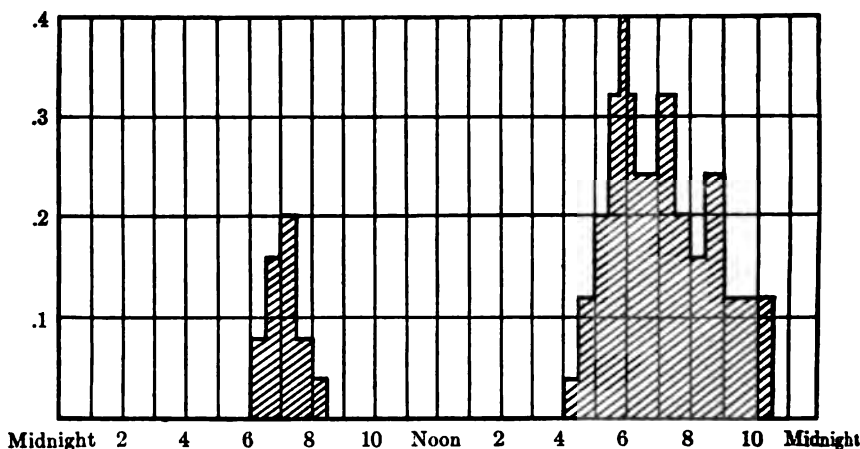


DIAGRAM No. 3—TYPICAL RESIDENCE LOAD FOR DECEMBER DAY

will be of advantage to the company, and by a proper arrangement of the rates it need not add measurably to the expense to the consumer. Thus, in a residence, the lighting in the evening is something which will take place every day. It ought to be possible to extend the use of current in that residence for power purposes during daylight hours at a small cost to the consumer.

Diagram No. 4 is prepared upon the same plan, and is a typical representation of the current taken by a machine shop for small power load. The demand for current is assumed to commence at 7 o'clock in the morning, continue substantially until noon, shut down very largely during the

noon hour, and then the current is taken again until 6 o'clock at night. By comparing the peak of this diagram with the peak of Diagram No. 1, it will be seen that the load is very largely off from the peak of No. 1, and this is an explanation why power can be afforded more cheaply than light, a greater portion of which is upon the peak.

Comparing Diagram No. 4 with Diagram No. 2, which represents a summer month when the peak is later in the day, it will be seen that none of the power is upon the peak.

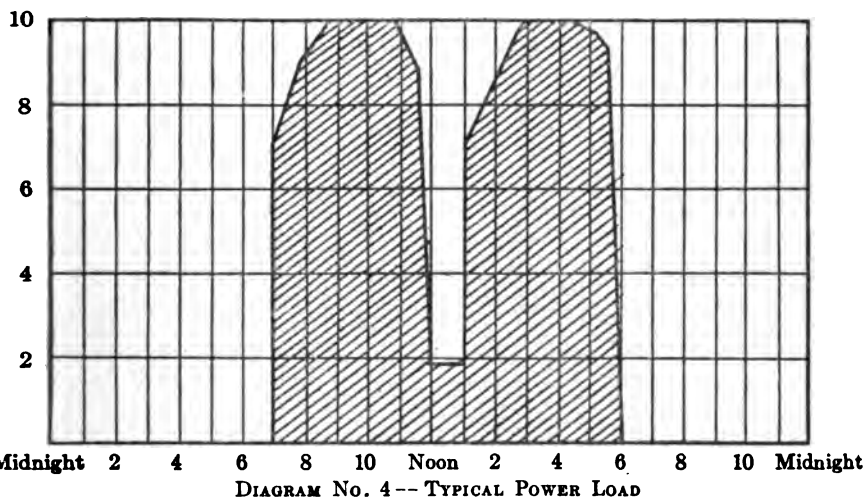


Diagram No. 5 is a typical representation of the consumption of current by street lights. Street lights, as shown by the diagram, extend from midnight until a little after 6 o'clock in the morning, begin again at 5 o'clock in the afternoon and continue until midnight; so a great portion of current is off peak during the summer months, while a much greater portion is on peak during the winter months.

The principle to be deduced from all of this is that the consumer should pay a greater price for the current taken during the peak load than that taken off the peak load, and

the difficulty in the case is to ascertain what portion of the current a given consumer takes is on peak load and what is off. No instrument has yet been devised which will record this fact, and accordingly we must trust to observation for the reaching of the proper conclusion. Lighting, as is well known, is very largely on peak. The existence of the lighting is what creates the peak. Power is on the peak very much less than lighting. The power consumer takes a very much larger percentage of energy off peak than the lighting consumer does.

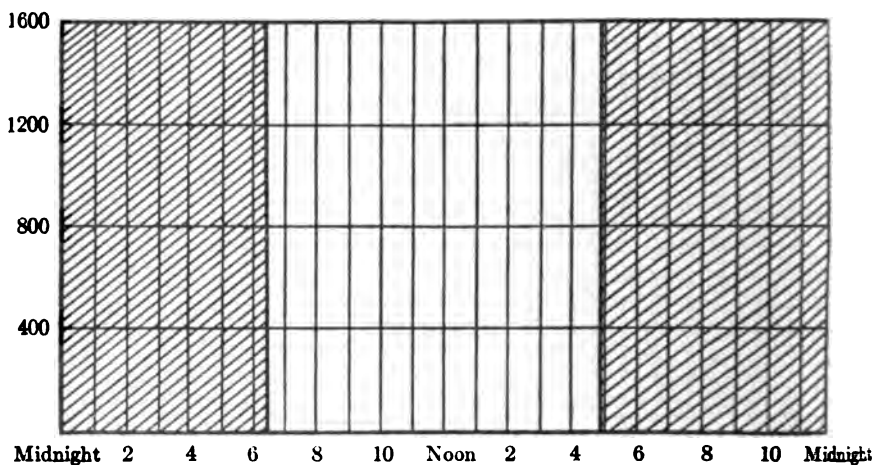


DIAGRAM No. 5—STREET LIGHTING LOAD FOR DECEMBER DAY

Another difficulty is in ascertaining the maximum demand of the consumer: that is, the greatest amount of current which he takes at any given moment during the twenty-four hours. Meters have been constructed which will determine this fact, but they are too expensive for ordinary use. They are practical, however, in the case of very large consumption for power. Accordingly, it is essential to ascertain in some practical, although it may be to some extent an arbitrary, method, the general average amount of demand of the consumer during the peak load hours. Experience has

settled this to some extent. It must be stated, however, that further investigation is very greatly required upon this point. When once the consumer has paid the proper sum for the current which he has consumed during the peak of the load, the company can well afford to make a very considerable reduction in price in order to induce him to extend the consumption during the hours off from peak, and the reduction in price will be of great benefit especially in residences. Electric energy ought to be applied to very many power uses in every residence, where it is now used in but few. Motors for driving sewing machines and washing machines, electric fans, vacuum cleaners, electric flatirons and cooking utensils, should be common, where they are now rare; and if the price could be made right their introduction would inevitably follow. For this reason a sliding scale in residences is imperative. The consumer should pay the equitable price for what he takes on peak, and therefore it will be for his advantage and for the advantage of the company to take current which costs the company nothing, that is out of the unshaded portion of the diagram, at a very low rate.

All of these considerations enforce the necessity of a differential scale of some sort. Different devices or scales have been adopted in different places, all of which were designed to accomplish the results herein indicated. It is not intended at this time to go into a discussion of the technical matters of consumer charge, demand charge, and others well known to electrical experts, nor to discuss or analyze the various schemes which have been presented to effect these results. Attention may well be called, however, to the fact that the Hydro-Electric Commission of the Province of Ontario has established a scheme by which every consumer is required to pay a certain sum whether he takes current or not, upon the basis of the area lighted: that is, the size of the rooms in which his lighting apparatus is installed; and then he is charged a very much less than usual rate for

current alone that is used. The consumer very speedily discovers that upon this basis of charge he can consume much more current without any extra charge than he was accustomed to consume under what may be termed the flat rate charge of so much per kilowatt-hour.

In preparing for an adjustment of the rates in this case, the parties were called upon for their suggestions. The respondent submitted a statement, carefully prepared by its principal expert, which has been studied with care. In that statement it is proposed to divide the consumers into four classes: residence lighting, general lighting, general power, and large light and power. In addition to these there would be also street lighting. This general classification is a very good one, and is accordingly approved. It is a rough but reasonable treatment of the different conditions under which the energy is taken and the different demands made by the consumer upon the company. It has accordingly been adopted as the basis of the rate to be fixed.

The division of consumers, however, into classes of this character raises questions which should not be overlooked in the adjustment. It is obvious that numerous questions will arise as to the class in which a given consumer should be placed. The two principal classes are (a) stores and business places using energy for both lighting and power, and (b) consumers using from one meter for both residence and general lighting.

Other questions arise of greater or less difficulty when the consumer has been allocated to one of the general classes. Some of these are as follows: (a) where current is supplied to one plant but the company for its own reasons supplies two meters for measuring the same; (b) where current is supplied to substantially one plant but parts thereof are located in different portions of the city; (c) where the customer has meters in disconnected properties; (d) where one meter serves different tenants in one building, and the landlord furnishes the light to the tenant and reimburses himself in the rent; (e) the customer having a meter in

the house and one in barn or garage situate on the same premises.

It is clear that in none of these cases should the Commission at this time attempt to fix the rule applicable to each case. The proper procedure is for the company to assemble all of these cases which have been found in experience to give trouble, propose rules for handling them, and submit such rules to the Commission for approval. These matters then can be worked out in the light of the experience of the company with all of the cases before the Commission at the same time, and can be made the subject of a supplemental order establishing the rule.

Special Service

There is a class of service the receipts from which in the year 1911 amounted to approximately \$79,000, which has not thus far been considered. It is what is known sometimes as special and feature service. This class takes into consideration special contracts and special situations which can not well be considered under the general heads hereinbefore laid down. A very considerable part of this service involves something out of the usual and hence it is impossible to lay down in advance precise and formal rules determining the rate to be charged. To a certain extent there must be some flexibility in this matter, provided such flexibility does not lead to unreasonable discrimination. The company should be required to cover these matters in its schedule of rates so far as possible, such schedule to be approved by the Commission. There is a question as to where some service should apply, whether in this class or in another. Some of the classes of service referred to are (a) breakdown service, (b) elevator service, (c) sign service, (d) special occasions, (e) matters not otherwise covered.

These matters should also be considered by the company and by the City, and be the subject of a further and supplemental order.

Street Lighting

The evidence regarding street lighting is in very unsatisfactory condition, and this probably is owing to the multitude of details involved in the case. It is undoubtedly the case that counsel have simply found themselves swamped by the number of matters requiring their attention and that the details as to street lighting have not been worked out with that care and attention which would enable the Commission to reach a satisfactory conclusion regarding the same.

An illustration of the difficulties the Commission has had to contend with, not only in this matter but in many others throughout the case, is shown by the following: One witness for the City made the claim that a very considerable saving could be effected by the use of magnetite lamps instead of enclosed arcs for street lighting. His evidence was reviewed by a witness for the company, who arrived at very different results. The interesting point is that the evidence by the company witness, as disclosed in respondent's exhibit No. 16, places the value of enclosed arc lamps at \$14 each, and the calculations are made upon that basis. As hereinbefore shown, the value of arc lamps fixed by another company witness for the general purposes of the case is \$29.49; and the amount paid the manufacturer is assumed to be \$21.70. This is a typical case of the different figures used by both parties in different branches of the case, and these differences have given rise to infinite confusion and trouble in handling the details.

At present the City seems to be paying \$56 per annum for enclosed arcs served from overhead lines and from a part of the conduits, and \$75 per annum for some served from a portion of the conduits. Just why there should be a distinction made in lamps served from conduits does not appear; nor does it appear why the difference is \$19 per lamp. The City, however, seems to recognize that there is a sufficient reason for the difference. At page 131 of its

brief it proposes the following as the rate for municipal arc lighting:

For municipal arc lighting for lamps supplied through underground conduits \$65 per lamp per year; for lamps supplied through overhead lines \$46 per lamp per year.

The contract in 1906, under which the parties are now operating, as above indicated, does not treat all lamps supplied through underground conduits alike. Apparently, 3395, as of December 31, 1911, were on the \$56 rate, and 323 were on the \$75 rate. Under these circumstances, the best that can be done is to recognize that the distinction obtaining in the contract of 1906 is proper because the City has agreed to it.

As to the price per lamp, we have not found ourselves able to agree with the City. An estimate has been made of the amount of the investment in the arc lighting system, the expenses attendant upon its operation concerning which, outside of current, there is no evidence in the case, and all of the other matters which would seem to make up a proper and reasonable price for arc lighting; and it does not appear as the result of these calculations that the price should be reduced more than 10 per cent from the existing figures. The classification of the source of supply should be that which is found in the contract of 1906, and an approximate reduction of 10 per cent would make in round numbers a price of \$50 and \$69 respectively.

There is some incandescent street lighting, for which the amount paid in the year 1911 is reported by the company as being \$5497.33. We discover no figures in the case showing indisputably how many incandescent lamps there are in service, except such as may be obtained from the annual reports of the company which have been put in evidence. At page 315 of the annual report for 1911, the company reports 465 incandescent lamps in service in street lighting, of 50-candle-power, and that the price per lamp per year is \$7.50: 465 lamps at \$7.50 per year would

produce \$3487.50, which is \$2009.83 short of the reported amount. At page 219 of the annual report for the same year the company reports 465 multiple incandescent lamps in service at commercial lighting, each consuming 40 watts per lamp, with 32-candle-power. The coincidence of the same number of lamps, 465, in each class, awakens suspicion that the figures are not compiled with that accuracy which is desirable for the decision of a disputed question. These incandescent lamps burn about 4000 hours a year, as we take it. This would require about five renewals a year. Whether the lamps belong to the City or belong to the company does not appear. The report of the examiner does not show any of these incandescent lamps in the inventory of property, nor does the inventory of the company mention any such lamps, so far as we can find. If the company owns the lamps and cares for them, \$7.50 is not an excessive price, as nearly as we can guess what the lamps are. Considering all the facts, a portion of which has been detailed, there seems to be no reason whatever for changing the price paid by the City for incandescent street lighting, and that should remain as before. If there is any substantial injustice done by this, the matter can be hereafter adjusted.

The Rate

The following are the maximum rates fixed by the Commission for the various classes of service enumerated:

Residence Lighting:

Available for residence consumers only.

Connected lighting load in kilowatts to be determined by actual inspection.

Maximum demand to be assumed to be one-quarter of connected load.

Net rate: 7 cents per kilowatt-hour for first 60 hours use of maximum demand; 4 cents per kilowatt-hour for next 120 hours use of maximum demand; 1½ cents per kilowatt-hour for remainder.

General Lighting:

Available for all lighting except residences.

Connected load in kilowatts to be determined by actual inspection.

Maximum demand to be assumed to be one-half of connected load.

Net rate: 7 cents per kilowatt-hour for first 60 hours use of maximum demand; 4 cents per kilowatt-hour for next 120 hours use of maximum demand; $1\frac{1}{2}$ cents per kilowatt-hour for remainder.

General Power:

Available to all power customers.

Connected load in kilowatts to be determined by actual inspection.

Maximum demand to be assumed to be three-quarters of connected load.

Net rate: 7 cents per kilowatt-hour for first 30 hours use of maximum demand; $3\frac{1}{2}$ cents per kilowatt-hour for next 40 hours use of maximum demand; 1 cent per kilowatt-hour for remainder.

All bills in above classes to be made out with net rates as above, for payment within ten days of date of bill; and with gross rate using 8 cents per kilowatt-hour for primary rate, such gross rate to be subject to discount to net rate if paid within ten days from date of bill.

Large Light and Power:

Available for all consumers willing to guarantee a maximum demand of 10 kilowatts.

Maximum demand determined by maximum demand meter.

Net rate, Demand Charge: \$2.75 per kilowatt for first 10 kilowatts demand; \$1.50 per kilowatt for each additional kilowatt demand.

Energy Charge: 1 cent per kilowatt-hour for all energy used.

Gross rate, Demand Charge: \$3 per kilowatt for first 10 kilowatts demand; \$1.75 per kilowatt for each additional kilowatt demand.

Energy Charge: 1 cent per kilowatt-hour for all energy used.

Street Lighting: Arc Lamps:

Direct current system operating on not less than 6.6 amperes with 70 to 75 volts at lamp terminals and magnetite lamps of the type now in use, \$50 per year except as herein-after specified.

All lamps of either of above types ordered or required after the 1st day of March, 1907, to be supplied by any underground wires, and specified in the contract between the City of Buffalo and Buffalo General Electric Company dated the 14th day of May, 1906, for which the company was to receive and to be paid at the rate of \$75 per annum, \$69 per annum.

Street Lighting: Incandescent:

At the rates now prevailing and now charged by Buffalo General Electric Company to the City of Buffalo for such service.

The following table shows the revenue derived by the respondent from each class of service affected in the year 1911, the amount of reduction, the percentage of reduction, and the amount of revenue which would have been produced had the rates been in effect for that year:

Class	1911 revenue	Reduction		Revenue as reduced
		Amount	Per cent	
Residence lighting.....	\$127,000	\$42,000	33.0	\$85,000
General lighting.....	474,000	133,000	28.0	341,000
General power.....	95,000	31,000	32.7	64,000
Large light and power.....	214,000	71,000	33.2	143,000
	\$910,000	\$277,000	.....	\$633,000
Street lighting: Arcs \$50 and \$69, Nos. 3606 and 323.....	215,000	24,000	11.0	191,000
Grand total.....	\$1,125,000	\$301,000	26.7	\$824,000

The calculations for the foregoing table were made from data showing the residence business for 1911 classified between flats and houses, and showing the number of customers, the kilowatt-hour consumption, and the revenue for each month; also the average size of installation for flats and houses. That for general lighting was from data furnished by the company, showing business for specified months classified according to hours use of connected load by hours, and showing the kilowatt-hour consumption and the revenue for each class. The same is true of the power business. The calculations were made upon data furnished by the company, and which data were used by the expert for the company in submitting his calculations for a rate to the Commission. The rate for street lighting was reached by computing the actual cost to the company with a proper return upon the amount of property used in the business and upon the expense incurred for operation.

These rates as fixed by the Commission comply as nearly as it is possible to make them with the requirements hereinbefore discussed. The proper data as to connected load necessary for putting in force this rate should be assembled by the company at once. It is understood that a large part of it has already been gathered. All questions arising in the course of establishing the rate and practice should be submitted by the company to the Commission for final determination when the questions are once ascertained.

Minimum Rate

The company is at liberty under this schedule to establish a minimum rate. It would be better if the Commission felt at liberty so to do, but there is sufficient uncertainty in the law as to its power in this respect to make it advisable to remit the matter to the determination of the company, subject to the following observations:

The minimum rate should be a yearly minimum and not a monthly minimum. The proper proportion should be charged monthly, however, and an adjustment made at the

end of the year. It is a serious question whether the minimum rate should not depend upon the size of the installation. The minimum rate for residences should not exceed \$9 per year for the smallest class of customers. The question as to large installations is held open for further consideration.

Existing Rate

The existing rate schedules of the company, as hereinbefore indicated, are imperfect and discriminatory by reason of the fact that they are what is known as the step rate. Under such a rate it always follows, that with every break in the price a customer near the maximum limit of his class pays more than one who is near the minimum limit of the next class. This always creates dissatisfaction and trouble and should always be avoided. Another criticism upon this rate is that it does not break from the maximum soon enough. All residence lighting under the company's schedule was entitled to lower rates for larger quantities, but the change in quantity occurred after so many hours use that it was testified that no residence in Buffalo obtained the benefit of it, and all paid the maximum rate. We understand that this is not true as to one residence, but that fact is wholly immaterial. There is no theory by which the maximum can be held for so long a period of time as in the existing rate with regard to the actual cost to the company. Nominally, lighting consumers were paying 9 cents as a maximum. Owing to the minimum charge in force upon monthly bills, however, the actual average rate to lighting consumers has been nearer 10 cents than 9 cents.

General Comments

A considerable misapprehension as to the force and effect of the decision in this case may arise unless some general observations are made.

1. The maximum rate fixed in this case can not properly be used as a criterion for a proper maximum rate in any

other place or in any other controversy. It is clear that a maximum rate depends upon the character of the load as well as the quantity: that is to say, the load factor is an element; and necessarily, the time of consumption. A business which is all upon the peak demands a higher maximum than a business which is spread out over long hours. A rate suitable for one place may be entirely unsuited to another unless the conditions of the load are practically the same.

2. The Commission has not attempted to fix any definite percentage of return upon the capital invested. It has used for illustrations and for some calculations the rate of 6 per cent. The truth is, no one can tell what return a given rate will produce either in the aggregate or as a percentage upon some other sum. The returns can only be ascertained by experience. All that can be determined in such a case as this is that the rate is not confiscatory: that is to say, it will return at least 6 per cent upon the ascertained fair value of the property used in the public service. There is no such thing as keeping the return, however, at 6 per cent. The conditions will vary from year to year. Operating expenses will vary; gross earnings will vary; and in a town which is not thoroughly developed, as Buffalo is not, a rate should be so fixed as to increase the return to the company by increasing its revenues above the limit fixed without a proportional increase in expenses. This, it is believed, is precisely what will happen in the case of the Buffalo General Electric Company. There has been a very considerable growth in its business during the last two or three years. There should be a very much larger growth during the next two or three years, and this will introduce into the problem new complications.

3. The complications just referred to are that the business of the company ought to increase, and this will demand the investment of fresh capital. The company must be left in a situation that will enable it to finance its growth properly and upon reasonable terms. It is now serving the

public and must continue to serve the public. The problem concerning electric energy generated at Niagara Falls is very great. It involves elements which are now insoluble. The amount of energy available and to be available for the next ten years from this source is unknown. As has been indicated in the case, there is a grave possibility that steam power will have to be resorted to for the supply of electric current in the near future in the city of Buffalo. If such is the case, that fact may demand an entire revision of the rates herein fixed, not only in case a steam plant is erected, but also in case its erection is contemplated, for the reason that a very considerable further investigation may be needed to determine whether the rates fixed would be remunerative with a steam plant producing part of the energy consumed. The calculations in this case, elaborate as they have been, relate to hydro-electric energy as against steam generated energy, and no calculations have been made which warrant any conclusions as to the cost of energy partly derived from water generation and partly from steam generation.

All of the foregoing considerations have been kept in mind in the determination of this case. The subject under consideration has been so vast in extent; the factors to be considered are so complex, involved, and in many respects contradictory and uncertain, that the Commission can not feel sure that errors have not crept into its calculations and that its conclusions may not be to some extent erroneous in matters of detail.

APPENDIX

The diagrams on the following pages show graphically the average rates per kilowatt-hour for various hours use of maximum demand, for each of the proposed rates.

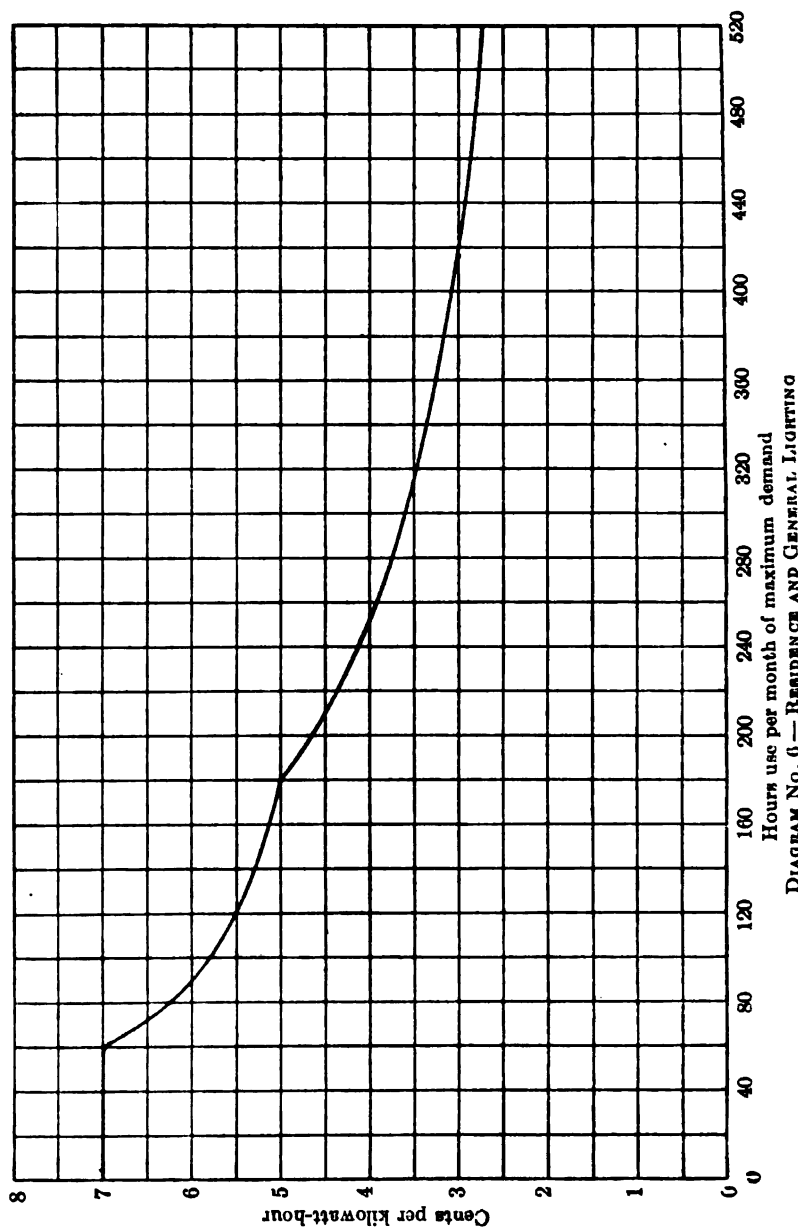
A simple illustration will explain the use of these diagrams. Suppose a residence customer has installed a total capacity in lamps of 1000 watts (= 1 kilowatt). Then his maximum demand would, in accordance with the proposed residence lighting rate, be one-quarter of 1000 watts = 250 watts, or $\frac{1}{4}$ kilowatt. Suppose, further, that the consumption of current for a given month as shown by the meter is 50 kilowatt-hours. Then the hours use of the maximum demand is $50 \div \frac{1}{4} = 200$. (By hours use is meant the number of hours which would be required, when using current at a rate equal to the maximum demand, in order to consume an amount of energy equal to that which was actually consumed. The hours use is, therefore, equal to the consumption in kilowatt-hours divided by the maximum demand in kilowatts.)

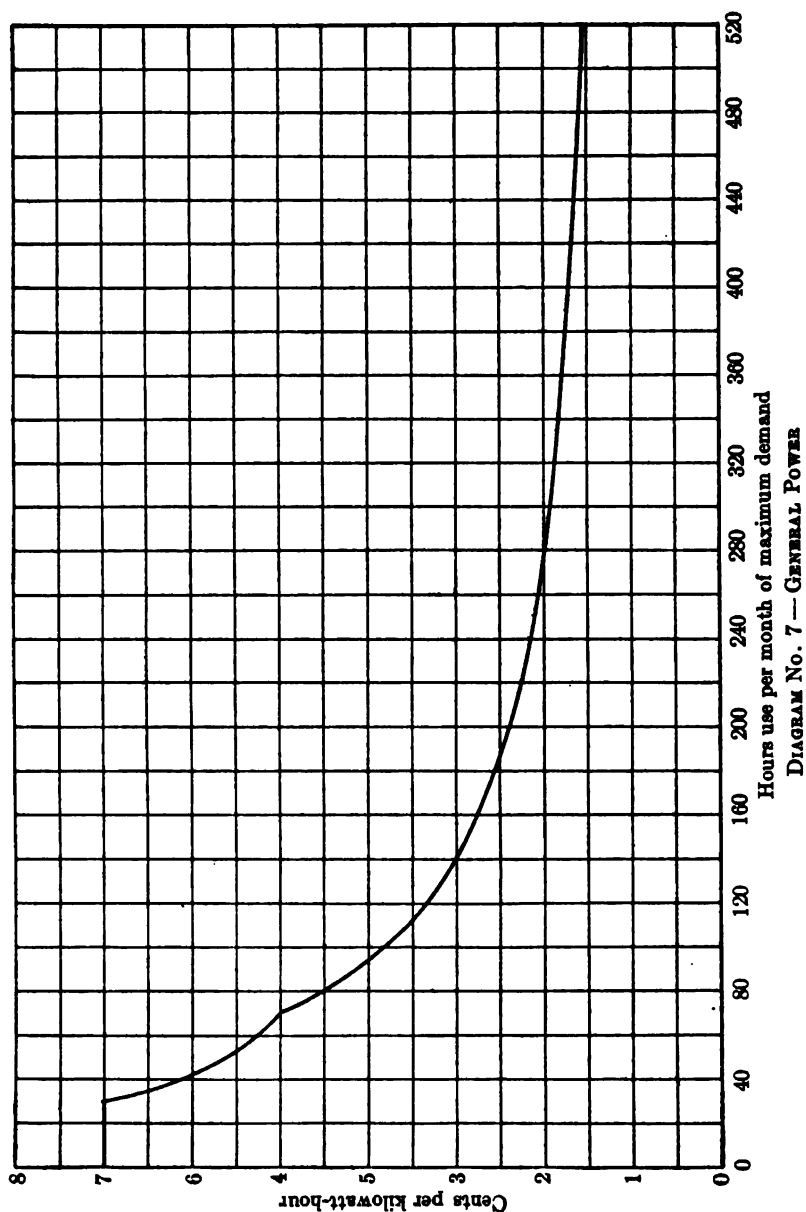
The bill would be computed as follows:

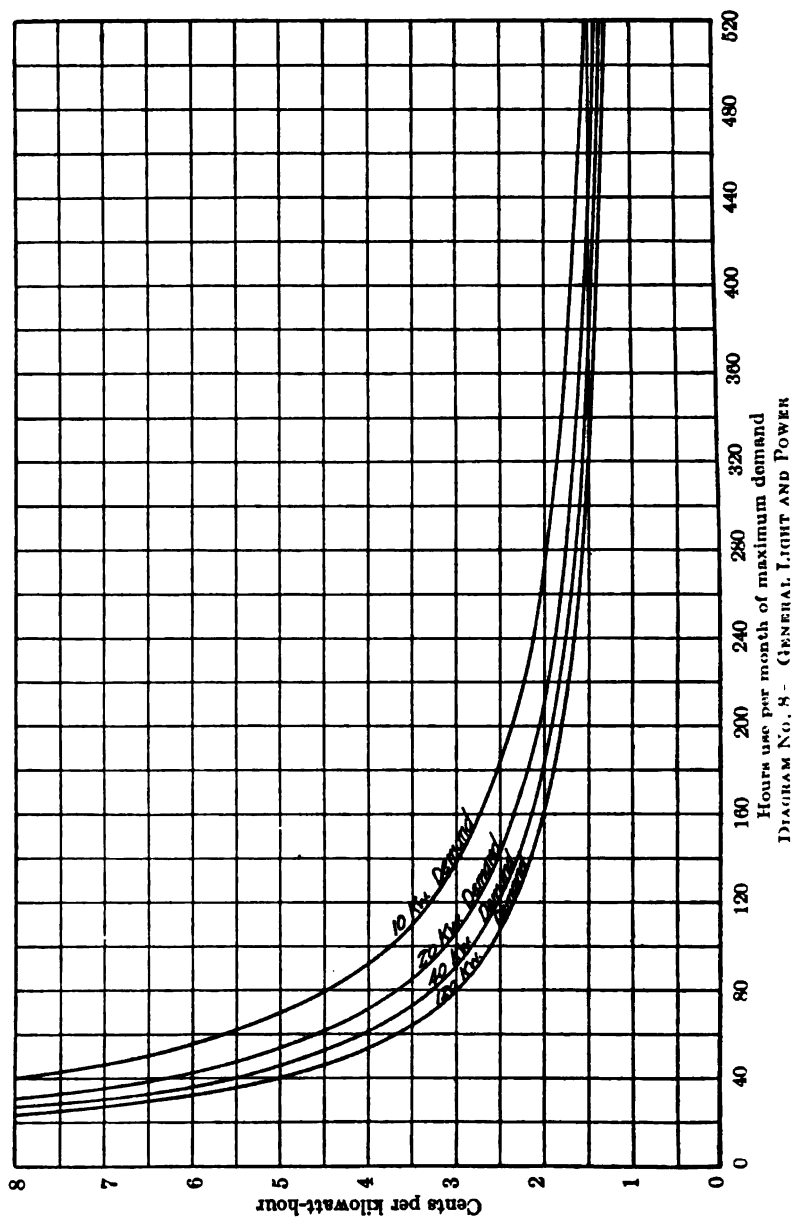
$60 \times \frac{1}{4} = 15$	kilowatt-hours at 7c	=	\$1.05
$120 \times \frac{1}{4} = 30$	" " " 4c	=	1.20
Remainder 5	" " " $1\frac{1}{2}$ c	=	.08
Total	50	" "	= \$2.33

Average rate = $2.33 \div 50 = 4.66\text{¢}$ per kilowatt-hour.

By inspection of Diagram No. 6, it will be seen that the rate corresponding to 200 hours use of maximum demand is 4.66 cents, just as calculated above. The function of these diagrams is merely to show at a glance the results which would otherwise have to be laboriously figured out.







In the Matter of the Petition of NORTHERN POWER COMPANY under section 68 of the Public Service Commissions Law for permission to exercise rights and privileges in the Village of Antwerp and in the Town of Antwerp, Jefferson county; and in the Town of Rossie, St. Lawrence county.

Petitioner seeks by the building of a transmission line from Gouverneur and exercise of a franchise granted by the Village of Antwerp to furnish electricity for light and power in that village, notwithstanding the fact that the Antwerp Light and Power Company is operating in the village of Antwerp. The Antwerp company has not been furnishing adequate service for light or power in that village, but it has arranged so to do and intends to file a duly executed agreement covering the installation of steam power to be used as auxiliary to its water power at Antwerp. These arrangements have involved considerable investment on the part of the Antwerp company. Upon the facts and conditions in this proceeding, *Held* that upon the filing on or before May 1, 1913, of the said duly executed agreement the petition of Northern Power Company so far as it relates to exercise of franchise granted to petitioner by the Village of Antwerp and the construction of its transmission line to the village of Antwerp should be denied, and that as to the other matters embraced in the petition the case should be closed subject to further application on the part of petitioner in respect thereto. The petitioner to have leave to apply for reopening of the entire case on or after November 1, 1913, upon affidavits showing that the Antwerp company is failing to render adequate continuous service to the people of that locality.

Submitted March 24, 1913. Decided April 2, 1913.

H. M. Ingram for petitioner.

John N. Carlisle for Antwerp Light and Power Company, in opposition.

DECKER, *Commissioner*:

The petitioner asks the permission and approval of the Commission to exercise rights and privileges under franchises or consents granted by the Village of Antwerp and the super-

intendent of highways of the Town of Antwerp, both in Jefferson county, and the superintendent of highways of the Town of Rossie in St. Lawrence county, and to begin construction of its transmission line and distribution system under said franchises or consents. The Antwerp Light and Power Company operates in and about the village of Antwerp and opposes the petition so far as it asks permission and approval to construct a line in the village of Antwerp and exercise the franchise granted by the board of trustees of the village of Antwerp.

The only two points where service of consequence would be rendered by the petitioner in the construction of the proposed transmission line would be in the village of Antwerp, and in the village of Spragueville which is in the town of Rossie. If permission and approval in relation to the Village of Antwerp franchise were denied to the petitioner, it would not construct its line to the village of Spragueville. It follows, therefore, that the matter in controversy is as to permission and approval of the Village of Antwerp franchise. The petitioner's proposed transmission line is to be constructed from Gouverneur to Antwerp, a distance of twelve miles, passing through Spragueville, a village of about three hundred inhabitants and which lies between Gouverneur and Antwerp. The Northern Power Company is a distributing company which furnishes and distributes electric current produced at Hannawa Falls and Higley Falls on the Raquette river in St. Lawrence county, and carries the same over its transmission lines to Ogdensburg, Potsdam, Canton, Gouverneur, Heuvelton, Lisbon, Hermon, Richville, and to the Stella Mines Company at Stellaville. Apparently it is able under normal conditions to obtain current sufficient to supply any and all requirements which might be made upon it under any of the franchises embraced in this proceeding. It has given testimony based upon estimates of expected business to the effect that this extension of its transmis-

sion line would yield a profit upon the investment, but any such showing must be qualified by the continuance in business of the Antwerp Light and Power Company at Antwerp. It is plain that the two companies could not divide the present or prospective business and both operate at a profit. The real basis of petitioner's case with reference to the approval of the exercise by it of the Village of Antwerp franchise is in the showing of utterly inadequate service on the part of the Antwerp Light and Power Company. It must be found as fact that prior to the filing of the petition the Antwerp Light and Power Company was unable to furnish sufficient current from its then existing plant, operated by water power, to light the village at all seasons of the year, to say nothing of any then existing demand for power in that locality. During the low water seasons the Antwerp Light and Power Company, depending solely upon water power, could not serve the Village or its other customers. The record shows, however, that it has made some improvements to its plant, and that it has entered into an arrangement with the F. X. Baumert Company, operating a cheese factory in Antwerp, whereby it shares in the cost of installing additions to the Baumert steam plant and participates in a reciprocal arrangement with the Baumert company for power, the effect being to give both the Antwerp company and the Baumert company considerable additions to their power resources, either water or steam, and that claim is fairly made that the Antwerp Light and Power Company will be in a position during the spring months to meet all demands for electric current, whether for light or for power purposes. The agreement between the Antwerp company and the Baumert company is as yet in the form of correspondence or memorandum, but it is to be duly prepared and executed. There is no reason to doubt the good faith of the parties, and the interest of each in completely consummating the agreement by execution of a formal instrument is apparent. There is some demand for electric current

for power purposes in Antwerp, and the testimony indicates that this demand is liable to be considerably increased. No showing is made that the quality of the service rendered by the Antwerp Light and Power Company, to the extent it has been able to render it, is bad, and there is not in this case any question that the Antwerp company's rates are excessive, or that the rates of the petitioner, if it should be permitted to engage in business in Antwerp, would be materially lower than those which have been charged or will be charged by the Antwerp company. The Antwerp company is endeavoring in various ways to increase its water power facilities, principally with reference to obtaining power from Lake Bonaparte. The Village has a five year lighting contract with the Antwerp Light and Power Company which was made during the Summer of 1912 and runs from October 1, 1912. If the improvements which have been arranged for by the Antwerp company shall be completed promptly, we are unable to see why that company will not be able fully to serve Antwerp and its locality.

This Commission in March, 1910, approved the petition of the Antwerp Light and Power Company to exercise rights under a franchise granted to it by the Village of Antwerp, and also authorized the Antwerp company to issue its capital stock to the amount of \$43,000 for the purpose of acquiring the property rights of Joseph A. Baumert in the electric light company then in existence in that village. It is certain that, with the introduction of a new company in the village of Antwerp for the purpose of supplying Antwerp with electric light and power, neither company could operate at a profit, and the investment in the Antwerp Light and Power Company's property would be very seriously damaged, and might eventually be destroyed. On the other hand, the people of Antwerp are entitled to good and adequate electric service; and if the Antwerp Light and Power Company shall prove unable or unwilling to supply such service, the propriety of admitting the petitioner into that field is obvious.

The Commission is of the opinion that upon the filing with it on or before May 1, 1913, of a duly executed agreement, based upon the present memorandum agreement between the Antwerp Light and Power Company and the F. X. Baumert Company, the petition in this proceeding, so far as it relates to the exercise of the franchise granted to petitioner by the Village of Antwerp and the construction of its transmission line into the village of Antwerp, should be denied; and that as to the other matters embraced in the petition the case should be closed, subject to further application on the part of the petitioner in respect thereto. The order of the Commission should also give the petitioner leave to apply for a reopening of the entire case or on or after November 1, 1913, upon affidavits showing that the Antwerp Light and Power Company is failing to render adequate continuous service to the people of that locality.

In the Matter of the Application of THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY; ROME, WATERTOWN AND OGDENSBURG RAILROAD COMPANY; THE UTICA AND BLACK RIVER RAILROAD COMPANY; OSWEGO AND ROME RAILROAD COMPANY; CARTHAGE, WATERTOWN AND SACKETS HARBOR RAILROAD COMPANY; THE NIAGARA FALLS BRANCH RAILROAD COMPANY; and LITTLE FALLS AND DOLGEVILLE RAILROAD COMPANY for leave to consolidate.

Consolidation of Rome, Watertown and Ogdensburg; Utica and Black River; Oswego and Rome; Carthage, Watertown and Sackets Harbor; Niagara Falls Branch; and Little Falls and Dolgeville railroad companies with The New York Central and Hudson River Railroad Company, according to the terms of a consolidation agreement duly made under the provisions of the Railroad Law, approved.

Decided April 9, 1913.

A. H. Harris for the applicants.

Thomas C. Watkins for Mrs. Jerome B. Watkins and Mrs. F. B. Hull.

James J. Franc for Edwin G. Bruns, stockholder Rome, Watertown and Ogdensburg Railroad Company.

Joseph C. Jackson, jr., for himself and other stockholders of Rome, Watertown and Ogdensburg Railroad Company.

William D. Morrow as railroad commissioner and attorney for the Town of Theresa, Jefferson county.

Cortlandt F. Bishop for estates of Matilda W. White and of David W. Bishop, stockholders Rome, Watertown and Ogdensburg Railroad Company.

William Starr Miller in person.

DECKER, Commissioner:

This is an application to the Commission for approval of the consolidation of the Rome, Watertown and Ogdensburg; Utica and Black River; Oswego and Rome; Carthage,

Watertown and Sackets Harbor; Niagara Falls Branch; and Little Falls and Dolgeville railroad companies with The New York Central and Hudson River Railroad Company. The consolidation is sought to be effected under the Railroad Law (sections 140, 141, and 142), and under section 140 the approval of this Commission is necessary before the consolidation can be accomplished. The proceedings thus far taken by the companies in progressing the matter of consolidation have all been, as we are advised, entirely in accord with the procedure prescribed in the Railroad Law.

The capital stock of the new corporation, which is to be The New York Central and Hudson River Railroad Company, the same as the present company of that name, is proposed to be \$225,581,100 divided into 2,255,811 shares of the par value of \$100 each. The combined capital stocks of the present companies amount, in shares of \$100 each, to 2,361,537 shares, with a total par value of \$236,153,700, or \$10,572,600 in par value more than the intended capital stock of the proposed consolidated corporation. This decrease results from the necessary cancellation of the stocks now owned by two of the companies, which are parts of the outstanding stock issues of other companies parties to the consolidation, less certain additions arising from the bases of exchange shown in the consolidation agreement which will be described.

The New York Central owns 80,188 shares of the Rome, Watertown and Ogdensburg, which has a stock issue of \$10,000,000. These shares, par value \$8,018,800, are to be canceled. The remainder, 19,812 shares, may be exchanged for 25,359 $\frac{36}{100}$ shares of the stock of the consolidated corporation. This exchange of stock by outside owners is upon the basis of one share of Rome, Watertown and Ogdensburg stock for one and twenty-eight hundredths share of stock of the consolidated corporation. Par value figures are \$1,981,200 Rome, Watertown and Ogdensburg stock

exchangeable for \$2,535,936 consolidated corporation stock: difference \$554,736. The Rome, Watertown and Ogdensburg road has been under lease since March 14, 1891, to The New York Central and Hudson River Railroad Company, upon a rental of 5 per cent on the stock of the Rome, Watertown and Ogdensburg company. The New York Central dividend is and for some time has been on a 5 per cent basis. Its average dividend for the past twenty years has been $4\frac{7}{8}$ per cent. The New York Central stock sells now above par and around 105. It has been until recently considerably higher, around 115, but in common with other railroad securities the market quotations for some time past have been comparatively low. If the exchanged stock were sold even as low as par, it would realize \$2,535,936, and this sum invested at 4 per cent in such good securities, now easily obtainable, as the holder may select, would yield a return amounting to \$101,437.44. The 5 per cent return on the present stock, under the lease, amounts annually to \$99,060.

The New York Central owns 9331 shares of Utica and Black River stock, and the Rome, Watertown and Ogdensburg holds 11,200 shares of Utica and Black River stock. These shares, par value \$2,053,100, are to be canceled. The stock issue outstanding of the Utica and Black River is 22,230 shares, par value \$2,223,000. The remainder of the stock, 1669 shares, may be exchanged for 3058 $\frac{20}{100}$ shares of the stock of the consolidated corporation. This exchange of stock by outside owners is upon the basis of one share of Utica and Black River stock for one and eighty hundredths share of stock of the consolidated corporation. Par value figures are \$166,900 Utica and Black River stock for \$305,820 consolidated corporation stock: difference \$138,920. The Utica and Black River has been under lease to the Rome, Watertown and Ogdensburg since April 14, 1886, upon a rental of 7 per cent on the stock of the Utica and Black River. If the stock received in exchange

were sold even as low as par it would realize \$305,820, and this sum invested in obtainable good 4 per cent securities would yield a return annually of \$12,232.80. The 7 per cent return on present Utica and Black River stock, under the lease, amounts annually to \$11,683.

As to the Oswego and Rome, the New York Central owns 2022 shares of the outstanding stock issue of 2149 shares, leaving only 127 shares in outside hands. The 2022 shares held by the New York Central are to be canceled. The remaining 127 shares are exchangeable on the basis of one share of the Oswego and Rome for three-tenths of a share of the consolidated corporation.

As to the Carthage, Watertown and Sackets Harbor, the New York Central owns 215 shares of 7 per cent preferred stock and 4627 shares of common stock, all of which will be canceled. This is all of the preferred stock issued and all of the common, except 23 shares which are to be exchangeable on the basis of one share of the Carthage, Watertown and Sackets Harbor stock for two shares of the stock of the consolidated corporation.

As to the Niagara Falls Branch railroad, 2430 shares are owned by the Rome, Watertown and Ogdensburg and 70 shares by the New York Central, and these, constituting all of the stock of the Niagara company, will be canceled.

As to the Little Falls and Dolgeville, the New York Central owns 2484 shares which will be canceled. The remaining 16 shares will be entitled to exchange for stock of the consolidated corporation on the basis of share for share.

Stockholders who through exchange are entitled to a fraction of a share of stock will receive a certificate of ownership thereof, and the certificate will provide that when certificates for fractions of shares equal to one or more full shares shall be presented a certificate for a full share or shares in the consolidated company stock equal to that represented by the fractions of shares shall be issued in

place thereof. Such fractions of shares are not to be entitled to any interest or dividend or voting power.

Among other features of the consolidation agreement is the following: Until surrendered and exchanged for certificates issued by it, the consolidated corporation shall recognize the now outstanding certificates of stock of the respective consolidating corporations (except such of said certificates as are to be canceled as hereinbefore provided) as evidencing the rights and interests of the several holders thereof as stockholders of the consolidated corporation, to the same extent and in the same manner as those rights and interests would be evidenced by certificates issued by it had such outstanding certificates been exchanged therefor. After the consolidation shall have become effective, however, there shall be no further issue or transfer of certificates of stock of the consolidating corporations, but from time to time as such certificates are presented to the consolidated corporation they shall be canceled and certificates of stock of the consolidated corporation shall be issued, on the several bases above set forth, in exchange therefor. The certificates of stock of the consolidated corporation shall be substantially in the same form as the now outstanding certificates of stock of The New York Central and Hudson River Railroad Company.

All of these other roads have been integral parts of the New York Central system and, with its other lines, the subjects of common operation for a long period of years, the Rome, Watertown and Ogdensburg and the Utica and Black River, as indicated by the leases, since the Spring of 1891. There has been, during all of this long period, an actual consolidation of all operations. This has been completely so, even to the extent of merging of operating and income accounts. The sole exception has consisted in the continuance of the separate corporate existence of each company, as was necessary of course to comply with the terms of the leases. While there would be some benefit to the

New York Central because some expenses pertaining to the maintenance of separate companies are now incurred, the real benefit to that company arises from the merging of the properties themselves, thereby adding largely to the security of its present funded debt and substantially increasing its credit conditions in future financial operations.

There is no reason inhering in the situation of these companies as corporations, nor in the location of their properties, nor in public policy, in view of the previous actual operating consolidation for twenty or more years, which would justify disapproval of the consolidation application, and no person or interest has appeared to oppose the application upon any such ground.

The sole opposition to the application for approval of the consolidation comes from the Town of Theresa, in Jefferson county, which is the holder of 438 shares of The Utica and Black River Railroad Company stock; from representatives of estates which hold stock in the Utica and Black River or Rome, Watertown and Ogdensburg companies; and one or more protesting individual stockholders in these companies. Such opposition is based upon the fact that under the leases of the Utica and Black River to the Rome, Watertown and Ogdensburg, and of the Rome, Watertown and Ogdensburg to the New York Central, holders of stock in the Utica and Black River and the Rome, Watertown and Ogdensburg are entitled under the contract of lease to receive a stipulated definite return upon their stock, equal in the case of the Rome, Watertown and Ogdensburg to 5 per cent and in the case of the Utica and Black River to 7 per cent, annually; while under the consolidation proposed they must take their chance of return upon the general financial success in the future of the New York Central and the declaration of adequate dividends by the board of directors of the New York Central Company.

The leases are for the corporate existence of the two lessor companies mentioned, but the guarantee of a return

upon the stock as rental applies only during the continuance of the lease in each case. At the times these leases were entered into the provisions of law relating to consolidation of railroads which are now invoked by the consolidating companies were in effect substantially as they are today, and had been in force since 1869. In other words, these leases were made subject to the operation of laws then in force. The objectors before us, whether a town, executors of estates, or individuals, are simply minority stockholders whose rights accrued after and subject to the right to consolidate given by the Legislature to all the corporations involved. (*Hart v. Ogdensburg & L. C. R. R. Co.*, 69 Hun 378; *Colby v. Equitable Trust Co.*, 124 A. D. 262, 192 N. Y. 535; *Durfee v. Old Colony & Fall River R. R. Co.*, 87 Mass. 230, 240; *Hale v. Cheshire Railroad*, 161 Mass. 443; *Nugent v. Supervisors*, 1 Wall. 241, 248, 22 Law. Ed. 83; *Venner v. Atchison T. & S. F. R. R. Co.*, 28 Fed. 581, 589; *Colgate v. U. S. Leather Co.*, 73 N. J. Eq. 72, 79, 81; *Cook on Corporations* § 499 and cases cited; *Wood v. Seattle*, 52 Law. Rep. Ann. [note at p. 382-385].)

If for any reason they can be regarded in the light of creditors whose rights may not be impaired, as is provided in section 143 of the Railroad Law, the objection raised by the objectors is not well founded, since by that section all debts and liabilities incurred by either of the corporations parties to the agreement are attached to the new corporation and are to be enforced against it and its property to the same extent as if incurred or contracted by it. (*Gale v. Troy & Boston R. R. Co.*, 51 Hun 471; *Polhemus v. Fitchburg R. R. Co.*, 123 N. Y. 502; *Cameron v. United Traction Co.*, 67 A. D. 557; *Lee v. Stillwater & Mechanicville Street R. Co.*, 140 A. D. 779.)

The fact that the leases provide for payment of the stipulated rate of return on the stock as rental directly to the stockholders of the lessor corporations does not alter the standing of the objectors as stockholders, since the lease

agreements were made between the lessor and lessee as corporations.

We are unable after careful examination to find that making the proposed consolidation effective would constitute any invasion whatsoever of any legal right possessed by the minority stockholders.

The Commission may also exercise a sound discretion in cases relating to railroad consolidations. Has there been presented here on the part of these objecting stockholders grounds upon which to base a justifying decision adverse to the application?

The bases of exchange set forth in the consolidation agreement and above stated, together with the present usable market price of New York Central stock, make it certain that every minority stockholder may not only absolutely protect his investment but increase the rate of return above that provided in the lease to which his stockholding relates. The rate of dividend declared by the New York Central has fluctuated but little in twenty years.

If the company's operating expenses shall become from any cause or causes largely increased, with such addition to the ratio of operating expenses to gross earnings that the income from operation will appear too small, advances in rates will perforce be made and sanctioned.

There may be fluctuations in the rate of dividend, but we have no present considerations before us sufficient to warrant a conclusion that the average rate of dividend of this company will suffer in the future any radical diminution. If the bases of exchange for stock, taken in connection with the present market price of New York Central stock (which now ranges low rather than high in common with many other securities of the same high class), showed a loss to the present stockholders of the Rome, Watertown and Ogdensburg or Utica and Black River stock upon sale and reinvestment, or even a bare equality on a par value for New York Central stock, a serious question whether the exchange basis

is fair would be presented. It seems to the Commission that since every Rome, Watertown and Ogdensburg or Utica and Black River stockholder, outside of the corporation holders, can make money on his investment by a sale and reinvestment of the exchanged stock, or can continue to hold the present stock without exchange and receive the same benefits as would result from the exchange, or can exchange the stock and hold it on faith in the investment value of the new stock, the options so available are entirely sufficient to cover and protect the fair interests of these minority stockholders.

The Town of Theresa holds 438 shares of Utica and Black River stock upon which, as doubtless upon all other outstanding stock of that company, appears this statement: "7 per cent dividends guaranteed by the Rome, Watertown & Ogdensburg R. R. Co." This stock was issued after the Rome, Watertown and Ogdensburg lease of the Utica and Black River in exchange for Utica and Black River stock previously held. The only guarantee referred to can be the guarantee provided in the lease, which has been described, and the guarantee of stock so issued by the Utica and Black River can be no greater in scope or extent as against the Rome, Watertown and Ogdensburg than is prescribed in the lease itself. The present stock so held by the Town can be retained in the hands of the holding commissioners. Whether the commissioners can be retained in office upon an exchange of this stock or a sale of new stock (if an exchange is made) and the proceeds reinvested, is not for the Commission to determine. The Town will doubtless proceed in such manner as it may be advised is proper and desirable. We can not justly regard the Town holding stock as a stockholder having different rights or entitled to greater consideration than other minority stockholders. We call attention to this merely because the point has been made on behalf of the Town that this consolidation disturbs a settled investment of the Town.

The Commission has given much time and consideration to this consolidation. It is in every way desirable from the company's standpoint. The public is benefited in a substantial degree by the actual amalgamation of the properties, since some economies of accounting and administration will result, and needed improvements of the Rome, Watertown and Ogdensburg and the Utica and Black River lines in the way of double tracking and in other important respects can proceed with much greater freedom under the consolidation with general mortgage conditions applying to all of the properties than if moneys for such improvement are to be raised upon owned property and applied to improve the leased property. Moreover, the owner of a property feels a greater interest in improving that property than a lessee does of leased property upon whom the burden of necessary improvement falls under the terms of the lease. The latter is prone to limit the improvement to the minimum dictated by actual necessity. The Commission has been for sometime of the opinion that the traffic of these Northern New York lines and the accommodation of the public require considerable trackage improvement, including double tracking, beyond what has been effected, and it is inclined to take all proper steps which will contribute to such improvement.

For all of the reasons above outlined the proposed consolidation should be approved and order entered accordingly.

In the Matter of the Application of HARRY FISHER ET AL. for the Public Service Commission, Second District, to intervene and prevent the Grade Crossing Commission of the City of Buffalo from constructing an alleged dangerous crossing at the Erie railroad and Main street, in the city of Buffalo.

Section 91 of the Railroad Law confers upon the Public Service Commission full power and authority to eliminate grade crossings throughout the State, with the exception of such municipalities where that power and duty are vested in some local body.

Whenever there is a conflict between the provisions of a general law and a special law upon the same subject, it seems to be the settled practice of the courts, in the absence of any direction to the contrary, to give precedence to the special law; and this course is adopted by this Commission.

Accordingly *held* that the Public Service Commission has neither supervisory nor appellate jurisdiction in any matter involving the elimination of existing grade crossings in the city of Buffalo, specified in chapter 358, laws 1911; nor can this Commission institute or review proceedings for the elimination of any such grade crossing within the city of Buffalo, where there is a duly constituted Board of Grade Crossing Commissioners clothed with the power to conduct such proceedings, change the character of crossings, close streets or alter their grades, and adjust the expense thereof.

Decided April 15, 1913.

Harry Fisher for petitioners.
Proceedings ex parte.

HODSON, *Commissioner*:

This matter comes to the Commission upon the application of Harry Fisher, who is the alderman of the 20th ward in the city of Buffalo, and many of the residents and property owners in the neighborhood of Main street where the Erie railroad crosses the same in said city.

The petition invokes the aid of the Commission ostensibly to prevent the construction of an overhead crossing of Main

street by the railroad, but in fact the real grievance of the petitioners seems to be that the grade on both sides of the subway under the bridge which will carry the railroad over Main street will be such as seriously to interfere with the use of Main street as a thoroughfare for vehicles and will become a menace to travel upon said street, because there will be a 4 per cent decline into the subway from the north which will meet a like descent in the grade of the tracks of the Lockport division of the International Railway which enter Main street at right angles just north of the crossing.

It clearly appears from the petition of the moving parties that the Grade Crossing Commission of the City of Buffalo has already contracted with the Erie Railroad Company for the elimination of the grade crossing of such tracks with Main street; and it is claimed that the Public Service Commission should intervene at this time and prevent the consummation of a plan which, in the judgment of the petitioners, would create a greater peril to the public safety and a more dangerous condition of traffic than that which exists with the present grade crossing.

Jurisdiction is conferred by law upon the Buffalo Grade Crossing Commission for the elimination of certain existing grade crossings, within definite territorial limits, at the joint expense of the City of Buffalo and the railroad companies interested (laws 1911, chapter 358); and in this respect the special law applicable to the City of Buffalo differs materially from the general law conferring upon the Public Service Commission power to eliminate grade crossings throughout the State (Railroad Law, section 91).

Under the Buffalo Grade Crossings Act, the City and the interested railroad companies adjust the entire expense between themselves; but under the general law just quoted, the expense of eliminating grade crossings is borne by the railroad or railroads, the municipality, and the State, in the different proportions as hereinafter set forth; under the special grade crossings act applicable to Buffalo, the Grade

Crossing Commission, if it can not agree with the railroad companies upon the apportionment of the work or the cost of the proposed improvement, may apply to the Supreme Court for the appointment of commissioners to make such apportionment (laws of 1911, chapter 358, section 5); but under section 91 of the Railroad Law, which is the only statute vesting the Public Service Commission with authority to eliminate existing grade crossings, it is distinctly provided that the proceedings shall be initiated by a petition, either from the State Commission of Highways, or from the mayor and common council of a city, the president and trustees of a village, or the town board of any town, where any street, avenue, or highway crosses or is crossed by a steam surface railroad at grade; and if the proceedings are carried through to a successful termination, the obligation resting upon such municipality is only one-fourth of the cost of such elimination, another one-fourth is paid by the State, and the railroad is compelled to pay an equal half of the expenses, in all cases brought by such local authorities; while a different rule prevails for the division of expense in proceedings initiated by the State Commission of Highways, which is that "whenver under the provisions of sections 90 and 91 of this chapter [Railroad Law] a highway is constructed across an existing railroad, and is a part of a state or county highway constructed or improved as provided in the highway law, one-half of the expense of making such crossing above or below grade shall be paid by the railroad corporation, and the remaining one-half of such expense shall be paid by the State in the case of a state highway, and jointly by the State, County, and Town in the case of a county highway, in the same proportion and in the same manner as the cost of the construction or improvement of such state or county highway is paid". (Railroad Law, section 94.)

It is plain therefore that, although both the general Railroad Law and the Buffalo Grade Crossings Commission Act have the same object in view, i. e. the elimination of existing

grade crossings, the proceedings under them are totally dissimilar, are initiated by different officers, and the division and payment of the expense are not at all alike.

Both the Public Service Commission and the Buffalo Grade Crossing Commission are creatures of the law, and manifestly have no greater or other jurisdiction than is found in the express provisions of the law itself; none other can be assumed by us simply because we happen to be a State Commission and the Buffalo Commission is a local body; the two commissions are not in any way connected, either by law or usage, and neither should seek to trench upon the powers and duties or invade the domain of the other.

We believe, therefore, that section 91 of the Railroad Law confers upon the Public Service Commission full power and authority to eliminate grade crossings throughout the State, with the exception of such municipalities where that power and duty are vested in some local body; and that whenever there is a conflict between the provisions of a general law and a special law upon the same subject, it seems to be the settled practice of the courts, in the absence of any direction to the contrary, to give precedence to the special law; and this course is adopted by this Commission.

These views necessarily lead to the conclusion that the Public Service Commission has neither supervisory nor appellate jurisdiction in any matter involving the elimination of existing grade crossings in the city of Buffalo specified in chapter 358 of the laws of 1911; nor can this Commission institute or review proceedings for the elimination of any such grade crossing within the city of Buffalo, where there is a duly constituted Board of Grade Crossing Commissioners clothed with the power to conduct such proceedings, change the character of crossings, close streets or alter their grades, and adjust the expense thereof.

In accordance with this opinion, let an order be entered dismissing the petition herein.

In the Matter of PATRICK O'DAY *against* NEW YORK TELEPHONE COMPANY.

Respondent ordered to extend its Williamsville telephone line a distance of about two miles to connect with the residences of complainant and seven other prospective subscribers upon stated terms.

Submitted March 21, 1913. Decided April 16, 1913.

Charles F. O'Connor for complainant.

R. V. Marye and *Walter F. Crowell* for respondent.

DECKER, Commissioner:

Respondent's line is constructed within about two miles of complainant's residence which is located about four miles east of Williamsville on the Buffalo-Batavia state road. The Pioneer Telephone Company's line now ends about one and one-half miles to the east of complainant's residence. Complainant applied to respondent, New York Telephone Company, for a connection with its line, and thereupon respondent offered to make the connection on terms described as follows: Complainant to pay for building the line over the two miles distance, the cost being estimated at \$670, and thereafter to pay an annual rental charge of \$66. This annual charge is made up by taking the base rate for the Williamsville exchange telephone service which is \$18, and adding thereto a mileage charge of \$48 which is equal to \$6 per quarter mile. The service to be rendered would be a multi-party business service. With this connection complainant would receive service in respondent's Williamsville exchange and pay a 5 cent toll rate to Buffalo in which he is specially interested. This offer so made by respondent would give it an extension of line for two miles without cost and an annual charge for service approximating 10 per cent of the cost. It is fair to say, however, that the offer was based entirely upon the assumption that but one subscriber, the complainant,

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would use the line. At the hearing it was developed that at least eight subscribers would use the line, and that an acceptable guarantee would be furnished by complainant covering the use of the line by these eight subscribers for a period of not less than three years, or money payment equivalent to the amount of the rates which would be paid if all of said subscribers should use the line. This is concededly a totally different situation, and one which should and must change the terms on which the connection should be made. Respondent has a number of multi-party lines upon which it serves as few as eight subscribers over a distance of two miles or more and for which service it charges the ordinary multi-party base rates. Respondent can not complain, therefore, if for this service it should be required to make the extension as it has offered to do, and if it should be authorized to charge for the service on this extended line its Williamsville base rate of \$18 per year plus a mileage charge of \$2 per quarter mile, or \$16 additional per year, according however as the mileage may be. This would give respondent an annual charge on the two miles basis of \$34 for eight subscribers as a minimum, equal to a total of \$272. This should be fully sufficient to provide a reasonable return upon the cost of the line and use of instruments after deduction of the cost of operation including maintenance.

The Pioneer Telephone Company operates to the east and north of complainant's residence, with its central exchange at Clarence. In the past its service has not been good. Some of its lines appear to be overloaded. The farmers along the Buffalo road prefer the Williamsville exchange since their markets are at Williamsville and Buffalo. The toll rate for the Williamsville exchange area to Buffalo is 5 cents. The Pioneer Telephone Company's toll rate is 15 cents. It is said to be contemplating a two-number toll service to Buffalo for 10 cents keeping a particular person rate in effect at 15 cents. The objection of complainant and his associates to the Pioneer service is that they would be connected with the Clar-

ence exchange and they would have to use the poorer service of the Pioneer company besides paying a toll rate to Williamsville and a toll rate to Buffalo which is now three times the toll rate for the Williamsville exchange.

The New York Telephone Company and the Pioneer Telephone Company have a traffic agreement under which connected service is provided for and the operation by the Pioneer company in certain territory is recognized, but any agreement to the effect that the Pioneer company shall have a monopoly of the local service territory east of the New York company's present line is disclaimed.

The Commission is of the opinion that respondent, New York Telephone Company, should make the extension upon the filing with it of the indemnity bond offered by complainant at the hearing providing for at least eight subscribers to the line as extended, and their continuance as subscribers at standard rates in effect for a period of at least three years. If for any reason the respondent shall arrange for the extension of line to be made by the Pioneer Telephone Company, respondent, New York Telephone Company, should provide for the use of the line connecting with its Williamsville exchange by complainant and his associates upon the base rate of \$18 plus \$16 mileage and a 5 cent toll charge to Buffalo. Respondent should be at liberty to work out the details in its own way.

The Commission is of the opinion that the respondent, New York Telephone Company, should make, as a reasonable addition to its line, the extension along or near the Buffalo-Batavia state road from the end of its present line in that vicinity to connect with complainant's residence on that road, and at least seven other subscribers located on or near that road who shall previous to such extension by respondent, individually, or by complainant and one or more of said other subscribers, file with respondent an indemnity bond covering the taking by said subscribers of multi-party line service as connected with respondent's Williamsville exchange

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for a period of three years at a rate not less than \$18 per annum as a base rate plus \$2 per quarter mile as line mileage, and such further charge as may result from any reasonable addition to the base rate at Williamsville as may be established hereafter by respondent during such period of three years for subscribers generally in the Williamsville exchange area; provided (1) that such indemnity bond may provide for the payment of the full amount of the rentals as for the eight subscribers by a less number of subscribers in case eight subscribers shall not during the three year period continuously take the service; and provided (2) that respondent may arrange with the Pioneer Telephone Company for the making of such line extension and for service thereover with direct connection for complainant and such other subscribers with the Williamsville exchange of respondent; and provided (3) that the toll rate charged between complainant's and such other subscribers' stations and the city of Buffalo shall not exceed the toll rate between Williamsville and Buffalo; that complainant should furnish the said indemnity bond to the respondent on or before May 10, 1913, and that upon the filing with respondent of said indemnity bond the respondent should proceed promptly with the said extension as a reasonable addition to its line and put the same in operation with the service as hereinabove provided before June 15, 1913.

Order will be entered accordingly, with direction therein that respondent shall notify the Commission on or before April 25, 1913, whether it will accept and obey the provisions of the order.

In the Matter of the Petition of the VILLAGE OF SENECA FALLS by Augustus S. Hughes, its president, under section 90 of the Railroad Law, for a determination as to how two streets shall cross The New York Central and Hudson River Railroad Company's tracks in said village.

Although it is the settled policy of the State that all crossings of railroad tracks by public highways at grade should be eliminated in the interest of public safety, such policy is not violated by permitting a street in the outskirts of a village to be carried across a single railroad track at grade, so that the owner of all the property on the other side of the tracks, into which there is to be no extension of the street for public use, may conveniently reach and make use of such property.

Inasmuch as the railroad company objects to such grade crossing, it is not unreasonable to impose, as a condition for the same, that the municipality and property owner benefited by such grade crossing shall pay the expense of a flagman or gates, in case the railroad company is required to furnish or maintain the same at said crossing, for the period of ten years.

Decided April 28, 1913.

W. H. Hurley, Corporation Counsel, for the Village of Seneca Falls, petitioner.

Augustus S. Hughes, President of the Village of Seneca Falls, in person.

Harris, Beach, Harris & Matson (W. A. Matson, of counsel) for The New York Central and Hudson River Railroad Company.

HODSON, Commissioner:

Pursuant to the provisions of section 90 of the Railroad Law, the Village of Seneca Falls has presented to the Public Service Commission its petition, asking for the authority of this Commission to carry Pine and Johnston streets in the village of Seneca Falls at grade across the tracks of The New York Central and Hudson River Railroad Company.

It appears satisfactorily from such petition that all the preliminary requirements of the statute with reference to the

laying out of these streets across such tracks have been taken by and on behalf of said Village; both of such streets end at their easterly termini at the tracks and property of such railroad company, and in a part of said village where there are very few residences or buildings of any kind; neither of said streets has ever been improved at this point, and there has never been any crossing over such tracks, or either of them, except at Pine street, where it is claimed there exists a private right of way or farm crossing in continuation of that street across the tracks; the territory on the southerly side of such tracks, embraced within produced lines of the continuation of such streets, and also on the easterly and westerly sides of such lines and extending southerly from said railroad tracks to the Seneca canal, consists wholly of private property now belonging to Rumsey and Company of said village, who are large pump manufacturers; the present plant of Rumsey and Company is to be taken over for the improvements and extension of the Barge Canal through such village, and said firm has procured this tract of land on the southerly side of the railroad, which is now entirely unimproved and vacant but upon which they intend to erect a large manufacturing establishment which will employ at least three hundred people from the start.

The petition in this case is made on behalf of the municipal authorities, and specifically asks the Commission to authorize said Pine and Johnston streets to be carried across said railroad tracks at grade; urging that any other crossing of said tracks would be impracticable because of the grade which would be required in the construction of either a subway or overhead crossing; and the petitioner goes so far as to assert that unless a grade crossing shall be allowed and ordered by this Commission the said land now owned by Rumsey and Company would be valueless to them, and the village might be deprived of the benefits of one of its principal industries; this strong position taken by the village authorities was supplemented and strengthened by the president of Rumsey and Company at the hearing which was

recently had in this case at Seneca Falls; he stated to the Commission that he had conferred with the operating department of The New York Central and Hudson River Railroad Company, the division superintendent and one or two other officials, who together looked over the proposed crossing, and agreed with Rumsey and Company, both verbally and in writing, that there would be no opposition on the part of The New York Central and Hudson River Railroad Company to a grade crossing at that point, but that when the matter came up before the village authorities in the preliminary proceedings to extend such streets across the tracks the railroad company appeared and refused to recognize the statement made by the officers mentioned, and then opposed the grade crossing as it did on the hearing before this Commission. The president of Rumsey and Company further stated to the Commission on such hearing that if a grade crossing is not authorized the company would not utilize the land for its plant, but would leave it as it now is, entirely unimproved; it further appeared on said hearing that this property is the only available tract in the village within a reasonable distance of the homes of the majority of the workmen who are now employed by Rumsey and Company; they are mechanics and own their own homes and now live within a convenient distance of the proposed plant; the president then stated to the Commission emphatically, that by reason of the heavy loads, consisting of many tons of iron, which it would be necessary to haul both ways, a subway with a grade of 6 per cent, or any other considerable grade, would be prohibitive as being too expensive for them to use, and that if a grade crossing is not authorized by this Commission, no crossing of any kind be authorized.

At the hearing the railroad company appeared in opposition to this plan, and proposed a subway construction in continuation of Johnston street, which according to the plan presented by it would involve a 6 per cent grade from Johnston street into the subway, by carrying Johnston street

thirty or forty feet west of its present line, in order to gain the benefit of a depression in the land at that point; this crossing with a subway would cost about \$25,000, the expense of which the railroad company is willing to share, as the law provides; but the village authorities have not receded from their position that a crossing at grade would cost substantially nothing, and under all the circumstances would be the most feasible and convenient crossing for all parties concerned.

Thus the question is squarely presented to this Commission, as to whether or not a crossing of these railroad tracks at grade shall be authorized, in the face of the well known policy of the State, that all crossings of railroad tracks by public highways at grade are dangerous, and should be eliminated in the interest of public safety, and as fast as funds can be provided for that purpose.

But it must be borne in mind that a far different situation is here presented than is comprehended in the statement just made; these two streets in question now end at the railroad tracks, or at the property of the railroad company; the Village of Seneca Falls has conducted proceedings to carry them across the tracks, but no farther; there are no streets after crossing the tracks; all the property there is private, and no streets have either been laid out or projected, and none ever will be built, because the whole tract is to be used by Rumsey and Company for their business; and these streets, if carried across the tracks, will be, for that distance, solely for the use and accommodation of Rumsey and Company, their teams and their employees, and they probably never will be generally used by the public as highways; everybody and every interest, citizens and officials, within the village of Seneca Falls, except the railroad company, asks this Commission to permit Rumsey and Company to obtain access to their property over the stub ends of these two streets, for their own private use; but even if these streets continued beyond the tracks in a southerly direction and were generally traveled by the public, that would not make the crossings particularly dangerous, because this railroad consists of but

one track at these points, and only eighteen trains, all told and of all kinds, pass over them both ways during the period of twenty-four hours.

It is claimed by Rumsey and Company that they now possess the right to cross the tracks at Pine street, pursuant to some conveyance or proceedings which gave them a farm crossing at that point; and their president announced to the sitting commissioner at the hearing, as did also the petitioner, that they would be satisfied to have this Commission deny the petition as to Pine street, and rest their claim solely for a grade crossing at Johnston street.

Under all the circumstances of this case, we are of the opinion that no principle of settled public policy will be violated by permitting Johnston street to be carried across the tracks of the railroad at grade, so that the owner of all the property on the other side of the tracks, into which there is to be no extension of the street for public use, may conveniently reach and make use of such property.

But we also believe that, in granting this permission, due regard should be had for the rights and interests of the railroad company with respect to the maintenance of such grade crossing in the future; for we are not unmindful of the fact that after such grade crossing is installed, the local authorities of Seneca Falls would have the right under section 53 of the Railroad Law to invoke the order of this Commission to require the railroad company to station a flagman or erect and maintain gates thereat, which order would be manifestly unfair, in view of the present attitude of the railroad company in regard to the crossing, and its willingness to participate in the large expense of a subway crossing which it favors. This phase of the matter has been the subject of some discussion and correspondence since the hearing between the Commission and the petitioner, and there have been lodged with the Commission formal declarations on the part of the village authorities and Rumsey and Company, that neither of them will, within the period of ten years, require the

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protection at this crossing which is contemplated by section 53 of the Railroad Law.

We therefore conclude that the prayer of the petition herein, in so far as it asks for a crossing at Pine street, be denied, but that a crossing at grade be permitted at Johnston street, in the manner and with such safeguards as is provided by the Railroad Law of the State, upon the express provision and condition that, in case either the Village of Seneca Falls or said Rumsey and Company shall, during the period of ten years from the date of the granting of the order herein, institute any proceedings to require The New York Central and Hudson River Railroad Company, its successors or assigns, to station a flagman or erect and operate gates at said crossing; and in case said railroad company, its successors or assigns, shall, within such period of ten years, be required by any competent and lawful authority to station such flagman, or erect, maintain, and operate gates at such crossing, the expense thereof, for any part of said period of ten years, shall be assumed and paid, jointly and severally, by the said Village of Seneca Falls and Rumsey and Company.

In the Matter of the Complaint of J. L. CRANDALL *against*
UTICA AND MOHAWK VALLEY RAILWAY COMPANY.

Although respondent's intersecting Blandina Street and South Street lines in Utica for the greater distance parallel each other and are separated by a distance of about 1360 feet, under section 181 of the Railroad Law it is the duty of the respondent to provide transportation between said lines at a five cent fare for a continuous ride; and in its operating practice whereby passengers riding from one line to the other are required to change cars, such passengers must be transferred by respondent at a single fare under suitable regulation confining use of the transfer practically to the next car moving from the point of intersection except as such rule may be necessarily varied to provide adequate transportation facilities for transferred passengers.

Decided March 4, 1913. Amended opinion May 7, 1913.

F. K. Kernan for respondent.

DECKER, *Commissioner*:

Complainant prays that respondent be required to issue transfers between its Blandina Street line and its South Street line, so called, both of which are operated by respondent within the city of Utica. These lines for the greater distance parallel each other at a distance apart according to respondent's calculation of approximately 1360 feet. The Blandina Street line runs westerly on Blandina street about one and a-half miles. The South Street line runs westerly on South street a somewhat shorter distance, thence northerly for a short distance on Steuben street, Hopper street, and Union street to an intersection with the Blandina Street line, the whole distance of the South Street line to said intersection being about one and one-third miles. There are extensions of the lines above described to other parts of the city. Respondent issues transfers between its lines in Utica except as between the Blandina Street line and the line on South street: that is to say, it issues transfers except where the

ride on the transfer would bring the passenger back in a direction toward the starting point of his ride. If the South Street and Blandina Street lines were joined on the east as they are on the west, a belt line would be formed, and the one fare would, as respondent admits, cover the full ride around the belt. Respondent's principal objection to a five cent fare with a transfer to the South Street line, or in the reverse direction with a transfer to the Blandina Street line, is that with the short distance intervening between the lines, about a-quarter of a mile, the passenger living between the two lines or near either would be able to ride for one fare from a given point on either line to an opposite point on the other line and thus accomplish what in its view is a double ride for one fare with only a short walking distance for the passenger.

This case is subject in its determination to the application of section 181 of the Railroad Law. No question of fact or general question as to the reasonableness or justice of respondent's regulation whereby the transfer is denied, is involved in the case. We have simply to determine whether section 181 of the Railroad Law applies to the operation here described. The part of that section material here reads as follows:

No corporation operating a railroad shall charge any passenger more than five cents for one continuous ride from any point on its road to any other point thereof or any connecting branch thereof within the limits of any city. Not more than one fare shall be charged within the limits of any city for passage over the main line of road and any branch thereof.

It will be observed that the rule stated is not qualified by direction or by location of lines. Subject solely to the specification that a "continuous ride" is the basis of the legislative prohibition, it is plainly the duty of the respondent to provide transportation at the five cent fare between any point on Blandina street and any point on South street which is reached by its operated railway lines in the city of Utica. The word "continuous" as used in the statute

excludes the idea of a broken journey or of two distinct rides. The carrier is not compellable under the statute to afford two rides instead of one continuous ride, or to permit a stop-over on a transfer from one line to the other which would accomplish that result. Its right to run a through car over both lines with a five cent fare between the termini must be conceded. Its right to require a passenger at the intersecting point to take immediately a waiting car upon the other line is not to be denied. Its authority to put a time limit upon the use of the transfer sufficient to enable the passenger at all times to use the next car over the line shown upon the transfer must be recognized.

The Public Service Commissions Law in section 49 contains a somewhat similar provision in relation to continuous riding over two separately operated lines in the same city where the companies have entered into a contract for through service. Section 1566 of the Penal Law, relating to the improper use of transfers by passengers, supports the view that the passenger is entitled to a continuous ride, and that the passenger is not entitled to demand other than what is practically a continuous service according as changing of cars shall provide. *Bull v. N. Y. C. Ry. Co.* 192 N. Y. 361, and *Weber v. R. S. & E. R. Co.* 145 A. D. 84, may be regarded as tending to confirm the view here expressed.

Since the foregoing was written and an order issued requiring the respondent to afford a continuous ride at one five cent fare between points on its Blandina Street line and points on its South Street line, the Commission, by argument upon respondent's application for rehearing, has had its attention called to the decision of the Court of Appeals in *Kelly v. N. Y. City Ry. Co.* 192 N. Y. 97, wherein it was held, construing the then section 104 of the Railroad Law, that the defendant, operating a system of street railways in New York city, was satisfying the reasonable requirements of that section by limiting its transfer regulations to the right to ride north or south in New York [Manhattan]

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with a transfer to any crosstown line, and vice versa to ride crosstown with a transfer to any north- or southbound line. The court finds distinctly that extending the transfer privilege further would enable a passenger to accomplish a round trip for the one fare.

Section 104 of the Railroad Law was carried over in 1910 into the Public Service Commissions Law, and reads as follows:

Until and except as the public service commission shall otherwise prescribe as to any street railroad corporation or corporations pursuant to the provisions of this chapter, every street surface railroad corporation entering into a contract with another such corporation as provided in section seventy-eight of the railroad law shall carry or permit any other party thereto to carry between any two points on the railroads or portions thereof embraced in such contract any passenger desiring to make one continuous trip between such points for one single fare, not higher than the fare lawfully chargeable by either of such corporations for an adult passenger. Every such corporation shall upon demand, and without extra charge, give to each passenger paying one single fare a transfer entitling such passenger to one continuous trip to any point or portion of any railroad embraced in such contract, to the end that public convenience may be promoted by the operation of the railroads embraced in such contract substantially as a single railroad with a single rate of fare. For every refusal to comply with the requirements of this subdivision the corporation so refusing shall forfeit fifty dollars to the aggrieved party. The provisions of this subdivision shall only apply to railroads wholly within the limits of any one incorporated city or village.

Section 181 of the Railroad Law was enacted in 1910 and the essential part is quoted above, but it is quoted in full below for the purpose of comparison:

No corporation constructing and operating a railroad under the provisions of this article, or of chapter two hundred and fifty-two of the laws of eighteen hundred and eighty-four, shall charge any passenger more than five cents for one continuous ride from any point on its road, or on any road, line or branch operated by it, or under its control, to any other point thereof, or any connecting branch thereof, within the limits of any incorporated city or village. Not more than one fare shall be charged within the limits of any such city or village, for passage over the main line of road and any branch or extension thereof if the right to construct such branch or extension

shall have been acquired under the provisions of such chapter or of this article; except that in any city of the third class, or incorporated village, it shall be lawful for such corporation to charge and collect as a maximum rate of fare for each passenger, ten cents, where such passenger is carried in a car which overcomes an elevation of at least four hundred and fifty feet within a distance of one and a-half miles. This section shall not apply to any part of any road constructed prior to May sixth, eighteen hundred and eighty-four, and then in operation, unless the corporation owning the same shall have acquired the right to extend such road, or to construct branches thereof under such chapter, or shall acquire such right under the provisions of this article, in which event its rate of fare shall not exceed its authorized rate prior to such extension. The legislature expressly reserves the right to regulate and reduce the rate of fare on any railroad constructed and operated wholly or in part under such chapter or under the provisions of this article; and the public service commission shall possess the same power, to be exercised as prescribed in the public service commissions law.

Section 104 referred to roads operated under contract. Section 181, which takes its place in the Railroad Law, applies to any corporation and fixes the fare at five cents over the main line, or any road, line, or branch under control of the corporation, or any connecting branch thereof. With two or more roads embraced in one operating contract, the old section 104 speaks of the operation of said roads as "a single railroad with a single rate of fare". Section 104 used the words "continuous trip" while the present section [181] uses the words "continuous ride".

In the Kelly case, the situation presented was really the general system of transfers for New York city where the north and south lines are very long and the crosstown lines are relatively very short. What may be reasonable as applied to New York city, where there were then 657 transfer points and now doubtless many more, might be decidedly unreasonable as applied to a city like Utica with radiating lines and very few points of transfer.

After carefully reading the Kelly decision and the history of the case in the appeal book, we are satisfied that it ought not to be held controlling in all cases arising in cities or

incorporated villages throughout the State. The Kelly case was decided by the Municipal Court of New York City, Borough of the Bronx, in favor of the company. The judgment was reversed by the Appellate Term, with allowance of appeal to the Appellate Division, which reversed the Appellate Term, and then followed the appeal to the Court of Appeals. The appeal book includes the testimony of Mr. Oren Root, defendant's witness, which describes the whole New York city transfer system as it then existed, containing also this statement: "If we were obliged to give the transfer demanded by the passenger, he could travel at will to the most extreme northerly end of the island, across any crosstown line, and re-transfer again to any longitudinal line that he might elect *and thus make a round trip for a single fare.*" The witness also testified that the configuration of the island of Manhattan "is unique, and the fact that it is so narrow and that the business is concentrated in a comparatively compact territory, makes it peculiarly applicable to the situation on Manhattan Island, that is the opportunities for the return ride to the point of embarkation without any inconvenience to the passenger". The witness further distinguished the Manhattan situation from that existing in Brooklyn. The plaintiff by walking a short block could have reached his stated destination for one fare. It is plain that with the longitudinal lines and numerous crosstown lines a passenger by selecting a proper line for starting the ride could reach almost any destination besides the starting point for the one fare. So, very plainly, the great consideration before the courts in the Kelly case was the general transfer system in the Borough of Manhattan and the breaking down of that system if plaintiff's contention should be sustained, with the result that actual round trips to the exact point of original entry upon the first car taken would be possible.

It is evident both from the language of old section 104 and the present section 181 that in each section two points are in contemplation. In the latter, the continuous trip is

from "any point to any other point". The language of the law itself therefore precludes any idea that a round trip from one point back to that same point is thereby required for five cents.

In this case, respondent may have a passenger from the extreme easterly end of its Blandina Street line with an intended destination involving a-quarter of a mile ride on the parallel South Street line. Such a passenger can certainly demand a through ride for five cents without being subject to the charge of seeking a round trip for five cents. It is not to be conceived that passengers as a general rule would ride over these parallel lines to the point opposite the starting point and walk more than a quarter of a mile in order to avoid paying a second five cent fare. There may be a few who would so do, but that is incidental to the location of the lines as chosen by respondent or its predecessor. It is possible that a few persons living between the two lines could walk to one line, ride to the point of transfer, enter a second car and ride on the other line to a point opposite his residence, for the one fare. But the number of such persons must be comparatively few, and the thought excludes the many who live along each line or on the outside of the territory lying between the parallel lines.

If there were a canal or deep gorge between the Blandina Street and South Street lines, respondent's present contention would not be made. Section 181 of the Railroad Law has general application, and the section is not to be construed to apply or not apply because of respondent's fear that a few passengers would take two distinct rides for five cents. It is the privilege of respondent, as above stated, to confine the riding privilege of the person holding the transfer to the next intersecting car, and respondent may so arrange the running time of its cars that connection will be made at the point of intersection between the two lines with little or no loss of time. If for any operating reason it does not see fit to do that, the public should not be restricted to half a ride or to the payment of two fares for what the law

apparently provides shall be rendered for one. If the Blandina Street line and the South Street line ran on parallel streets a block apart, these two lines might well be considered as presenting a unique situation to which section 181 of the Railroad Law was not intended to apply, since they would be so close together that in a case of every passenger a round trip back to the starting point for five cents would in actual practice result. The same reasoning indicates the application of the law in a case where the two lines are, as in this one, more than a-quarter of a mile apart.

The distinction between the New York city [Manhattan] situation in the Kelly case and that shown here is obvious, and we hold that the Kelly case does not govern in this proceeding.

It must be concluded that under section 181 of the Railroad Law respondent must transfer passengers between its Blandina and South Street lines upon single fare of five cents, but that in so doing it may and should establish and enforce such regulation covering the transfer as will confine its use practically to the next car moving from the point of intersection over the transfer line, except as such rule may be necessarily varied to provide adequate transportation facilities for transferred passengers.

By appropriate proceedings and with the consent of this Commission the respondent company has been merged with New York State Railways, and order in this case has been directed against New York State Railways as successor to Utica and Mohawk Valley Railway Company.

Respondent's application for rehearing should be denied, and the order entered herein on March 4, 1913, be made effective.

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